IN THE SUPREME COURT OF THE UNITED STATES

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In the Matter of the Adoption of

DAVID ANDREW CABAN

A Minor under the age of Fourteen Years, by KAZIM MOHAMMED and MARIA MOHAMMED, his wife,

Appellees,

ABDIEL CABAN,

Appellant.

----------X

In the Matter of the Adoption of

DENISE CABAN

A Minor under the age of Fourteen Years, by KAZIM MOHAMMED and MARIA MOHAMMED, his wife,

Appellees,

ABDIEL CABAN,

Appellant.

----------X

CASE NO. 77-6431

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

CASE NO. 561

JURISDICTIONAL STATEMENT

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INTRODUCTION

This is an appeal from a judgment of the New York State Court of Appeals, as well as two subsequent judgments and orders of that court denying reargument, which dismisses appellant's appeal to that court from lower court orders dismissing appellant's objections to the adoption of his two children and approving their adoption by appellee, Kazim Mohammed. Appellant contends that New York State Domestic Relations Law, § 111, as it stood and was applied at the time of the adoption orders, and as it has been construed by the courts of New York, is unconstitutional on its face and as applied in authorizing the adoption of appellant's children, who he was raising, without his consent. Appellant submits this statement to show that this Court has jurisdiction of the appeal and to demonstrate that the questions presented are so substantial as to require plenary consideration of this Court.

(a) THE OPINIONS BELOW

The opinion of the Court of Appeals of the State of New York reported as Matter of David A. C., 43 N.Y.2d 708, 401 N.Y.S.2d 208 (1977). (Appendix A) That court affirmed an order of the Appellate Division of the Supreme Court of the State of New York, Second Department, which was reported as Matter of David Andrew C., 56 A.D.2d 627, 391 N.Y.S.2d 846. (Appendix B.) The Appellate Division affirmed orders of the Surrogate's Court, Kings County, dismissing appellant's objections and approving the adoptions. The opinion of the Surrogate's Court was not reported. A copy is appended as Exhibit C.

(b) JURISDICTION

(i)

These are two contested adoption proceedings, severally instituted by petition pursuant to Article 7 of the New York Domestic Relations Law, as it stood at the time, in the Surrogate's Court, Kings County, being the court of first instance, each to adopt a child of appellant, which were decided by the court of first instance in separate orders dismissing appellant's objections and granting the adoptions in a common opinion, despite appellant's constitutional objections, and which have been joined together and determined together, and the court of first instance being upheld by the appellate courts of the State of New York, culminating in a final judgment rendered by the highest court of New York State, where was drawn in question the validity of a statute of New York State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

(ii)

The judgment of the Court of Appeals of the State of New York, sought to be reviewed, was entered November 17, 1977, in a memorandum. Two motions for reargument and rehearing were successively denied by orders filed January 10, 1978 and February 14, 1978, in the Court of Appeals. The notice of appeal was filed on March 10, 1978 in the Surrogate's Court, Kings County

and on March 13, and March 22, 1978, in the office of the Clerk of the Court of Appeals of the State of New York, the clerks of such courts being possessed of the record.

(iii)

Jurisdiction of this appeal is confirmed by 28 U.S.C. § 1257(2) on the ground that a New York State statute, Domestic Relations Law, § 111, as it stood, was construed and applied at the time the order dismissing appellant's objections and approving adoption of his children were entered on or about September 10, 1976, was repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, but that its validity was necessarily sustained by the New York State courts in rendering the judgments on appeal.

(iv)

Cases believed to sustain jurisdiction:

Stanley v. Illinois, 405 US 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1971);

Quilloin v. Walcott, ___ US ___, 98 S.Ct. 549, 54 L.Ed.2d 511;

Zablocki v. Redhail, ___ US ___, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978);

Turco v. Monroe County Bar Association, 554 F.2d 515, (2d cir. 1977) cert.den. ___ US ___, 98 S.Ct. 122, 54 L.Ed.2d 95 (1977);

Department of Banking, State of Nebraska v. Pink, 317 US 264, 63 S.Ct. 233, 87 L.Ed. 254 (1942) reh.den. 318 US 801.

(v)

The statute involved is New York Domestic Relations Law, §111 (14 McKinney's Consolidated Laws of New York, Annotated, copyright 1964, Cumulative Annual Pocket Part for use in 1976-1977, p.51-52; McKinney's 1975 Session Laws of New York, Ch. 704, §3, p.1117), (especially subds. 2 and 3).

"§ 111. Whose consent required [Effective until Jan. 1, 1977]

Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

3. Of the mother, whether adult or infant, of a child born out of wedlock;

4. Of any person or authorized agency having lawful custody of the adoptive child.

The consent shall not be required of a parent who has abandoned the child or who has surrendered the child to an authorized agency for the purpose of adoption under the provisions of the social services law or of a parent for whose child a guardian has been appointed under the provisions of section three hundred eighty-four of the social services law or who has been deprived of civil rights or who is insane or who has been judicially declared incompetent or who is mentally retarded as defined by the mental hygiene law or who has been adjudged to be an habitual drunkard or who has been judicially deprived of the custody of the child on account of cruelty or neglect, or pursuant to a judicial finding that the child is a permanently neglected child as defined in section six hundred eleven of the family court act of the state of New York; except that notice of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to a parent if the judge or surrogate so

orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child. For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a finding that such parent has abandoned such child.

Where the adoptive child is over the age of eighteen years the consents specified in subdivisions two and three of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in subdivision four of this section shall not be required if in his opinion the moral and temporal interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe."

(c) THE QUESTIONS PRESENTED BY THE APPEAL

The case arose when, during a custody contest, still sub judice in one state court, between a father and mother of two children born out of wedlock -- appellant Abdiel Caban and appellee Maria Mohammed -- the step-father, appellee Kazim Mohammed, entered and, with the help of his wife, appellee Maria Mohammed, applied for and obtained orders of adoption on August 3, 1976, from another state court. He thus displaced the father as parent. The orders were granted without a showing or judicial finding of the father's unfitness or abandonment. One child, David Andrew Caban, was then seven

years old, and the other child, Denise Caban, was then five. At the time they were adopted, they had each spent at least half of their respective lives with their father and mother in a single de facto family unit.

The appeal presents the question of the existence of state power under the Fourteenth Amendment Due Process and Equal Protection Clauses to part the thickly knit strands uniting a fit and concerned father and his children, over the father's objection, on the basis of a state statute, N.Y. Dom. Rel. L. § 111 (specifically subds, (2) and (3)). The statute made his consent unnecessary to the adoption of his children and to the resultant rupture of his parental ties. It did so simply because (a) the children were born out of wedlock and (b) only because he is male.

The appeal for the first time brings to the Court the question of validity of N.Y. Dom. Rel. L. § 111 (2,3) under the Due Process and Equal Protection Clauses as construed and applied here to deny a fit and unwed father possessed of strong family and parental roots with his children and they with him, the right by objection to prevent their loss by adoption. This is to contrast with the facts before the Court earlier this Term (Quilloin v. Walcott, ___ US ___, 98 S.Ct. 549, 54 L.Ed.2d 511) where a different kind of father who had never had nor sought custody or responsibility for his child's care, was held for that reason to lack such rights. The appeal also poses the validity under the Equal Protection Clause of § 111 (3) authorizing a mother of children born out of wedlock to veto their own father's petition to adopt but denying the father's right to veto the mother's petition.

There is a strong trend in the United States for out of wedlock births. The Statistical Abstracts of the United

States, 1977, shows a steady rise from 3.9% in 1950 to 14.2% in 1975. Many of these children are doubtless born into de-facto families in which the father has conducted himself as a loving and responsible parent as has appellant.

(d) STATEMENT OF THE CASE; THE FACTS; HOW THE FEDERAL QUESTION IS PRESENTED.

Appellant and appellee, Maria Mohammed, are parents of two children born out of wedlock. Maria Mohammed's husband, appellee Kazim Mohammed, seeks to adopt them.

Before the children were born, appellant and appellee Maria Mohammed set up home together in Brooklyn, New York, and she took his name. They commenced a five year long relationship, living together as a de facto family, into which the children were born. At the time, appellant was separated from a previous wife with whom he had children. The trial judge accepted his testimony that he had continued to contribute to their support throughout the de facto family relationship with Maria. By the time the adoption petitions were filed, the prior marriage had terminated and appellant had remarried. He and his wife, Nina (not a party to this appeal) joined in a cross-petition for adoption. (R.49, 55) This failed for want of the mother's consent. (R.19, Appendix C, p.19).

Over the years, from their births, appellant had shouldered responsibility with respect to his children's daily supervision, education and care. He did so far more, in fact, than had their step-father, appellee Kazim Mohammed.

David Andrew Caban was seven years when adopted. He was raised for the first four and one-half years of his life in his father's home. Denise was five years old. Half

of her life was in her father's home. Both children were given their father's name at birth and his name appears on their respective birth certificates. Both children were born into, and were a part of an existing de facto family presided over by their father, appellant Abdiel Caban, and their mother, appellee Maria Mohammed (then known as Maria Caban). The parents had maintained a home together before the birth of their first child, and they shared custody of both children thereafter for a number of years. The mother left the father to live with appellee Kazim Mohammed. She took the children with her and married Mr. Mohammed. Appellant continued to see his children every weekend at his home. This lasted six to nine months. The young children were then sent away to Puerto Rico by their mother and step-father, appellee Kazim Mohammed, where they stayed without parents in their grandmother's house for some fourteen months until their father, the appellant, brought them back to live with him in Brooklyn. The children lived exclusively in appellant's care and custody thereafter for two months, from November 1975 to January 1976. During that period, the father took care of all of their needs and purchased a home to accommodate his now enlarged family. Legal custody proceedings in the Family Court resulted in a temporary custody transfer to the mother, with appellant granted weekly visitation rights pending a final hearing. The adoption proceedings by the mother and step-father, the appellees herein, were thereafter commenced in the Surrogate's Court, Kings County, and the merits hearing on custody in the Family Court adjourned pending outcome of the later-commenced adoption proceeding.

Until the adoption order broke up the de facto family ties to their father and transfered them to their step-

father, whose experience with appellant's children was relatively brief compared to their father's, their father continued regularly to exercise weekly visitation of his children at his home.

Appellant argued at trial level that the issue on his objection to the adoption was his unfitness. He contended that he was entitled, as father having extensive ties to his children and not shown to be unfit, to block the adoptions and maintain his legal parental relationship. He cited Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed2d 551 for his Fourteenth Amendment rights (R.252-3, 443-4).

The trial court ignored the argument. The hearing was presided over by a Law Assistant, Renee R. Roth, Esq. She agreed that Stanley required that appellant be allowed a hearing but professed not to know that Stanley required a hearing and determination on the issue of fitness before a father's child could be taken away. (405 U.S., 658)

The trial record contains the following exchange between Miss Roth and Mr. Bunks, who represented appellant (R.253):

"MS. ROTH: The Court has not told us a purpose of the hearing.

MR. BUNKS: You mean Stanley vs Illinois has not told you what the case is? To determine his fitness as a father.

MS. ROTH: If you will show it to me.

MR. BUNKS: I will show it to you now.

MS. ROTH: I think you ought to complete your proof.

MR. BUNKS: I have the case here.

MS. ROTH: I have read it many times, probably far more than you consider.

MR. BUNKS: Then I don't understand how you can say the question of fitness is not in this case.

MS. ROTH: Then put that in your memorandum of law.

MR. BUNKS: It is."

The hearing officer finally concluded (R.256-7):

"MS. ROTH: The purpose of this hearing is to afford the putative father with a hearing."

In his unreported opinion, the trial judge agreed that appellant "was entitled to the opportunity to be heard in opposition to the proposed step-father adoption" under Stanley (R.18) (Appendix C). But he limited the issues at the hearing so as to exclude those relating to appellant's constitutional rights to a determination of unfitness before being deprived of his children. The trial judge did not deny appellant's close relationship to the children. But, said the trial court, the purpose of the hearing was "not to determine the degree of his continued interest in the child but rather to determine the best interest of the child." The father was treated as an amicus curiae, not as one with parental rights of his own to assert.

The comment by the Hawaii Supreme Court in a similar case is apt. Willmott v. Decker, 56 Hawaii 462, 541 P.2d 13 (1975):

> "It is clear from the record * * * that the proceedings were conducted on the theory that the appellant, as the putative father of an illegitimate child, had no parental rights in and to his offspring. In this the family court was in error. Stanley v. Illinois, supra."

No misreading of Stanley v. Illinois could have been grosser than the one rendered by the trial court. This Court in Stanley held that natural fathers, like all other parents, married or not,

> "are constitutionally entitled to a hearing on fitness before their children are removed from their custody." (405 US, 658)

But, after a hearing at which his fitness was explored and not found wanting, the trial court simply dismissed his objections to the adoption, took his children away and legally supplanted him as father by a stranger, appellee Kazim Mohammed, "on the evidence". (R.24) It did not purport to apply any particular statute. There was no special need in the trial court to attack the constitutionality of a statute which did not appear to be applied.

Appellant appealed from the orders of the court of first instance to the Appellate Division, Second Department, on purely constitutional grounds under the United States Constitution. Appellant argued his Fourteenth Amendment rights under Stanley v. Illinois. That court, for the first time, in its opinion, treated the constitutionality of Domestic Relations Law, §111 to be the sole issue. Appellant had argued in that court that the statutory language did not render unnecessary to the cutting off of his parental rights a determination of a lack of fitness on his part, pursuant to Stanley v. Illinois, and that to construe it otherwise would be far-fetched and unnecessary and result in rendering it unconstitutional as applied.

The Appellate Division rejected appellant's constitutional argument. Matter of David Andrew C., 56 A.D.2d

627, 391 N.Y.S.2d 846 (1977). It construed the statute as making proof of appellant's unfitness unnecessary. It treated appellant's argument as an attack on the constitutionality of the statute as so construed and applied, upheld it constitutionality and, upon that basis, affirmed (R.463). The court's memorandum referred only to appellant's assertion of violation of Equal Protection rights. It ignored in its totality the extensive argument based on the Due Process Clause of the Fourteenth Amendment and so rejected it as well, if only sub silento. Ultimately, that court rested on Matter of Malpica-Orsini, 36 N.Y.2d 568, 370 N.Y.S.2d 511 (1975), app.dis. sub nom, Orsini v. Blasi, 423 US 1042, 96 S.Ct. 765, 46 L.Ed2d 643 (1976). The sole issue in that case was the Fourteenth Amendment validity of § 111 as there applied. (36 N.Y.2d, 569, 370 N.Y.S.2d 511) (On the state level, Malpica-Orsini had been a direct appeal to the Court of Appeals from the Family Court under New York CPLR § 5601(b)(2), which was possible of right "where the only question involved on the appeal is the validity of a statutory provision of the State or the United States under the constitution of the State or the United States.") Matter of Malpica-Orsini was thus limited to a holding on the constitutionality of § 111 under the Fourteenth Amendment. The holding in that case was that it was constitutional as applied. In resting on Malpica-Orsini, the Appellate Division thus predicated its affirmance of the trial court upon its following of the holding of Malpica-Orsini that the statute was constitutional.

Appellant thereupon appealed herein of right to the New York State Court of Appeals, the highest court of the state, pursuant to New York CPLR § 5601(b)(1). That

statute allows such an appeal "where there is directly involved the construction of the constitution of the State or the United States." He rested his appeal upon his Fourteenth Amendment rights to preserve his parental relationship absent proof of unfitness. The application and validity of § 111 having been raised first in the Appellate Division, appellant contended in the Court of Appeals that § 111, if construed to deny appellant his Stanley rights, would be unconstitutional. He argued that such an interpretation of the statute violated the accepted standards of statutory consideration. (Appellant's Brief in Court of Appeals, pp. 37-40; Appellant's Reply Brief in Court of Appeals, pp. 2-4; (See Appendix H)) cf. People v. Kaiser, 21 N.Y.2d 86, 103, 286 N.Y.S.2d 801, 815 (1967); cf. Matter of Carter v. Carter, 58 A.D.2d 438, 397 N.Y.S.2d 88 (1977))

The Court of Appeals dismissed the appeal. By necessity, it treated it as an attack on the constitutionality of the statute so construed (by citing Matter of Malpica-Orsini), so construed it, and upheld its constitutionality in the light of that construction. The court below stated: (Matter of David A. C., 43 N.Y.2d 708, 401, N.Y.S.2d 208)

> "The purportedly direct and dispositive constitutional issues underlying this appeal are no more than a restatement of questions whose merit has been clearly resolved against appellant's position. (Matter of Malpica-Orsini, 36 N.Y.2d 568, 370 N.Y.S.2d 511 (1975) app dsmd 423 US 1042), and must be held to lack the degree of substantiality necessary to sustain this appeal as of right under CPLR 5601 (sub. (b), par. (1)) * * *"

The text of CPLR 5601 sub. (b), par. (1) (2) is contained in Appendix I.

Dismissal of an appeal by the New York Court of Appeals for want of a substantial constitutional question is tantamount to a dismissal of the constitutional issues on the merits. Turco v. Monroe County Bar Association, 554 F.2d 515, 521 (2d Cir. 1977) cert. den. 98 S.Ct. 122; 54 L.Ed.2d 95 (1977); (see also Ellentuck v. Klein, F.2d (2d cir. 1/4/78 No. 77-7209))

The judgment dismissing the appeal to the Court of Appeals was filed November 17, 1977. Pursuant to Rule §500.9(b) of the Rules of the Court of Appeals of the State of New York, within thirty days after the dismissal, on November 30, 1977, by service of motion papers, appellant moved for reargument, reinstatement of the appeal, and reconsideration in the light of this Court's pending determination of Quilloin v. Walcott, No. 76-6372. (Text of Rule §500.9(b) is contained in Appendix(J). The motion was denied 1/10/78.

On the day the motion for reconsideration was denied, Quilloin v. Walcott, ___ US ___, 98 S.Ct. 549, 54 L. Ed2d 511 was decided. In view of the opinion in Quilloin, on January 19, 1978, being within thirty days of denial of his original motion, appellant moved for reargument of the denial of a rehearing, asking that the motion for reconsideration be granted, that the denial of the original motion for reconsideration, as well as the dismissal of the appeal, be vacated, the appeal be reinstated and considered in the light of Quilloin v. Walcott, the orders on appeal be reversed and the adoption proceedings be dismissed upon the ground that § 111 was unconstitutional. That motion was denied by order of the Court of Appeals filed February 14, 1978. The

same constituted the final determination of the constitutional issues presented by the highest court of the State of New York having jurisdiction thereof, and was tantamount to a holding that, upon the constitutionality of section 111, the orders of adoption were upheld.

Appellant has now exhausted all recourse under state law.

(e) THE QUESTIONS ARE SUBSTANTIAL

In Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551, this Court held the rights of natural parents, including unwed fathers, to their children as against strangers, to be among the highest ranked of all rights protected by the Fourteenth Amendment. (405 U.S., 651) Stanley made "a particularized finding that the father was an unfit parent" to be a constitutional predicate for taking his children away. Quilloin v. Walcott, ___ US ___, 98 S.Ct. 549, 54 L.Ed2d 511, 515; Stanley v. Illinois, 405 US, 657

The ruling was immediately made applicable to adoption statutes. In Rothstein v. Lutheran Social Services Wisconsin and Upper Michigan, 405 US 1051, 92 S.Ct. 1488, 31 L.Ed.2d 786 (1972), the Court held that the principles of Stanley are to be applied in weighing the validity of a state adoption statute which denied adoption rights to unwed fathers.

Several years later, in Orsini v. Blasi, 423 US 1042, 96 S.Ct. 765, 46 L.Ed.2d 631 (1976), the Court dismissed an appeal by the father of a child born out of wedlock from a New York decision (Matter of Malpica-Orsini) which upheld the constitutionality of New York Domestic Relations Law, §111. This same statute is again under attack, here, but on a very different record. The statute provided that the

consent of both parents was required for the adoption of a child born in wedlock, while the consent of the mother was required if the child was born out of wedlock. The difference between the cases lies in the sketchiness of the father's relationship to his child in Malpica-Orsini and the strongly knit ties between father and children here.

In Malpica-Orsini, the record included a stipulation in lieu of a testimonial transcript. The stipulated facts did not include that there had ever been a subsisting relationship, beyond that he was "the adjudicated putative father", between the father and his child; that the father had ever lived with the child; that he ever had or sought custody of the child; that he ever took care of the child. These are factors of critical constitutional significance. (See Quilloin v. Walcott, discussed below). The stipulation on which the father in Malpica-Orsini rested his rights, in lieu of proof of a meaningful relationship with his child, and at best for his contentions, was that he was "the adjudicated putative father"; that he has not "abandoned the child" or waived any "substantive rights he may have pursuant to statute"; that "there are no factual grounds to justify a finding that Mr. Orsini abandoned or neglected his child." It also provided that a hearing, if held, would have adduced sufficient facts "other than the abandonment or other waiver of rights by Mr. Orsini" to deny his objections and approve the adoption on the ground that the overall best interest of the child would warrant it." The stipulated facts fleshed out no real bonds at all between parent and child. Because

of the thinness and academic nature of the parent-child relationship revealed in Malpica-Orsini, it is apparent that the father there did not have at stake such a substantial interest as to warrant this Court's jurisdiction to review the constitutionality of the statute. Thus, § 111 was not ripe for review in that case. It is now.

(i)

DUE PROCESS

The necessity for an unwed father to be possessed of a substantial interest in his relationship with his children, beyond mere biological parenthood, to entitle him to Stanley protections in opposing adoption was just elucidated by this Court in Quilloin v. Walcott, ___ US ___, 98 S.Ct. 549, 54 L.Ed.2d 511

The father there had attacked the constitutionality of a Georgia statute which provided, as the New York statute has now been construed, that only the mother's consent was required for the adoption of a child born out of wedlock. He relied on the rights of parents, including unwed fathers, expressed in Stanley. The Georgia Supreme Court (238 Ga. 230), had upheld the statute, resting on Matter of Malpica-Orsini. Stanley was not disregarded. But the fact that in Stanley, "the father was a de facto member of the family unit", but not in Quilloin, was held enough to distinguish it. (238 Ga., 233-4)

On appeal, after noting probable jurisdiction, (431 US 937), the Court affirmed in a unanimous opinion by Mr. Justice Marshall. The holding rested on the unsubstantial relationship between the Georgia father and his child, which had left the paternal shoes empty in a real sense and ready to be filled by the step-father.

These factors were ruled by the Court to be dispositive. In substance, the Court held that an unwed father had to be a father in more than name only. With this as the limiting factor, whether a statute is constitutionally applied would depend on the facts at bar in each case. The Court reaffirmed Stanley v. Illinois but approached the problem of its application by noting that

> "Stanley left unresolved the degree of protection a State must afford to the rights of an unwed father, in a situation such as that presented here, in which the countervailing interests are more substantial." (54 L.Ed.2d, 515)

The "situation" in Quilloin was key to the decision. The facts were carefully scrutinized by the Court. They did not spell out a meaningful relationship of father to child. This lack took the father out of the protective mantle of Stanley.

The case at bar is quite different. To compare the facts of the two cases in the light of the standards adopted in Quilloin is clearly to illuminate the range of Stanley in protecting the rights of unwed fathers in adoption cases. Since the facts concerning appellant's relationship to his children are key to the existence of protected constitutional rights and to the substantiality of the constitutional questions, reference to them above makes a poignant contrast between the case at bar and Quilloin.

The effect of the adoption orders on appeal was to terminate appellant's parental rights. (See Matter of Anonymous (St. Christopher's Home), 40 N.Y.2d 96, 97-8 386 N.Y. S.2d 59 (1976). Nevertheless, though a solid family relationship existed between father and children, the New York courts

construed Domestic Relations Law, § 111 as authorizing their adoption by a step-father, without appellant's consent, and thus putting an end to the relationship. They overruled his objection that the statute could not allow such a result consistent with the Fourteenth Amendment absent proof of findings of unfitness by holding that it constitutionally did so. They cited Matter of Malpica-Orsini to emphasize the point and thus rested their holding upon a finding of constitutionality of the statute. As noted, Matter of Malpica-Orsini, was a case where there was a total absence of proof of a meaningful relationship between father and child such as appellant and his children enjoy here. This was of course vital to the issue as stated in Quilloin. This Court pointedly noted in Quilloin (54 L.Ed.2d, 520):

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' Smith v. Organization of Foster Families for Equality and Reform, 431 US 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977) (Stewart, J., concurring)"

Within Quilloin, appellant had a constitutionally protected relationship with his children, deserving of protection against the state statute and judicial acts which it authorized depriving him of his parentage in the absence of proof and specific finding of unfitness, under the Due Process Clause.

(ii)

EQUAL PROTECTION OF THE LAWS

Both on its face and as applied here, § 111 gives, and was construed to give, one parent of a child born out of wedlock the right to veto the other parent's adoption petition, so long as the parent being vetoed was the natural father, who had gone to Puerto Rico and brought his children back home and the parent doing the vetoing, the mother who sent them there. Only their sex was determinative. Thus, short shrift was given to appellant's cross-petitions for adoption below. (R. 47, 55) The trial court merely noted that a "putative father opposing such an adoption [by the step-father], without the consent of the natural mother, has himself no prospect of adopting the child." (R.19; Appendix C)

Section 111 gives the mother a veto over adoption by a father of his own children, despite the fact that it would not in any way threaten her maternal status, at the same time denying him a veto of her adoption. On the other hand, the statute denies a right to this fit and concerned father to veto an adoption of his children by a stranger, though the effect would be destruction of his own paternal status. Only the gender of the parent gives rise to this discriminatory classification of parents.

Another New York statute, Domestic Relations Law, § 70, provides:

> "In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly."

Accordingly, in custody disputes between the parents of children born out of wedlock, unwed father's rights have been

strictly protected and treated as equal to the mother's in New York in safeguarding the child's best interest. Matter of Hilchuk v. Grossman, 57 A.D.2d 798, 394 N.Y.S.2d 400 (1977). Where the facts indicate, an award will be made to the unwed father as against the unwed mother under § 70. Matter of Boatright v. Otero, 91 Misc.2d 653, 398 N.Y.S.2d 391 (1977). As against a non-parent, such as the maternal grandmother, an unwed natural father clearly has a superior right to custody. Raysor v. Gabbey, 57 A.D.2d 437, 395 N.Y.S.2d 290 (1977); Vanderlaan v. Vanderlaan, 405 US 1051, 92 S.Ct. 1488, 31 L.Ed. 2d 287.

Thus there was a distinct possibility that appellant may have been awarded legal custody in the children's best interest if the custody proceedings which began before and pended throughout the adoption proceedings, had instead gone to conclusion on the merits. Only in that case would § 111(4) have given appellant the right to prevent loss of his children to a stranger.

His constitutional right is made to depend not on his solid family ties but on "legal" custody. This is because of his sex. But on the other hand, the female parent is allowed to veto adoption by the father of his own children even if her legal custody is merely temporary, even if it were terminated and custody awarded to the father in the children's best interest, even if she did not possess any legal or actual custody at all. This is solely because of her sex.

The statutory distinction based on the sex of the parents is thus totally irrational. It violates both Due Process and Equal Protection. It has deprived appellant of his children and this Court should so declare its unconstitutionality.

A further discriminatory statutory classification is based on the fact that the children were born into an out of wedlock de facto family, resulting here in further violations of Equal Protection. The argument that the unwed father is entitled to the same rights as a married one had been made and rejected in Quilloin (54 L.Ed.2d, 520) only because the father there did not show the existence of a close and responsible relationship to his child deserving on balance of protection. The facts are otherwise here, as has been shown. The time has come for this Court to pronounce as applicable to adoption statutes, as here and similarly applied, the holding in Stanley v. Illinois, (405 US, 651-2):

> "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. Levy v. Louisiana, 391 US 68, 71-72 (1968). 'To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.' Glona v. American Guarantee Co., 391 US 73, 75-76 (1968)."

To have denied appellant the rights of a married father to preserve his parental ties under the facts here on the basis of the § 111 classification is to violate his rights to Equal Protection. The statute is unconstitutional as applied for that reason as well, and the Court should so hold.

Whether the classification based on sex or that based on marital status of parents is considered alone or

together with each other, it is founded on a conclusive, irrebuttable presumption which the statute makes appellant powerless to defeat, that he is somehow, because of his sex and non-marital status, less than fit as a parent. While § 70 properly provides for the absence of any presumptions "in all cases" between parents involving custody, § 111 in effect creates a conclusive presumption of unfitness of even the best of unwed fathers. It violates the Stanley precept against "presuming rather than proving * * * unfitness solely because it is more convenient to presume than prove." (405 US, 658) (See Vlandis v. Kline, 412 US 441 93 S.Ct. 2230, 37 L.Ed.2d 63 (1973) on the violation of Due Process by a permanent unrebuttable presumption that may not be true).

The statute's discriminatory classification based exclusively on sex and marriage cuts a wide swath into one of the most precious human relationships, that of parent and child. The right of a parent to raise his own child is fundamental. Stanley v. Illinois, 405 US, 651. A statute which creates discriminatory classifications of persons who may and may not exercise a fundamental human right requires critical examination by this Court. Zablocki v. Redhail, ___ US ___, 98 S.Ct. 673, 679, 54 L.Ed.2d 618 (1978)

Zablocki dealt with an Equal Protection violation of the right to marry. The Court placed it and the right to raise one's children and maintain family relationships "on the same level" (98 S.Ct., 681, 54 L.Ed.2d,630). In language strikingly apt to the case at bar, the Court stated (98 S.Ct., 682, 54 L.Ed.2d, 631):

> "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

The burden to uphold the classification rests, under Zablocki principles, upon appellees who are benefiting from it. There is no "sufficiently important state interest" in this case to justify tearing this father from his children. The breadth of the statute lumps together and denies rights to fit and unfit fathers of children born out of wedlock alike (but not to unfit married fathers); to fathers with deep and basic parental relationships and family ties with their children together with those who have lacked any interest at all following the act of procreation (but not with technically married but disinterested fathers). It prevents a fit father with custody and potential custody rights of his children as against a claim of the natural mother from asserting his own parental rights and vetoing their adoption by a total blood stranger, all because of his sex and lack of a legal relationship to the mother, while granting the same mother, who lacked that legal relationship with him and who is litigating the rights of custody with him in another court (and who might lose them to him), the right to veto his adoption of his own child. At the same time, it permits the mother to certify the jural relationship of the children to herself by adopting them without the father's consent, though without her consent he is barred from doing the same thing.

Section 111 has been well described by the reference in Zablocki (concurring opinion, Stevens, J., 98 S.Ct 691) to an equally wide cutting statute as

> "a statutory blunderbuss * * * * This clumsy and deliberate legislative discrimination * * * is irrational in so many ways that it cannot withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment."

Just as this Court held in Stanley that denying a hearing on fitness "to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause," (405 US, 658), so too the gender-based wedlock-based classifications in § 111 are arbitrary, invidious, irrationally discriminatory and violative of appellant's rights to Due Process and to the Equal Protection of the laws, both on its face and as applied.

CONCLUSION

By Quilloin v. Walcott, this Court has laid to rest the fears of the consequences of applying the principles of Stanley v. Illinois to all unwed fathers on a purely biological basis, and the consequent granting of veto power over adoption to fathers lacking any substantial relationship to and interest in their children. The present appeal presents the parental rights of a father who possesses a full history, relationship and interest in his children to keep them against state action that would deprive him of them, though he is not found to be unfit, solely because of his gender and his unwed status, and break up his family. Because of the soaring rates of illegitimate births, the problem affects large segments of the population. This Court should therefore note jurisdiction and give plenary consideration to the constitutional rights of fit but unmarried fathers to keep the children whom they have loved, cared for, had custody of and helped to raise, against strangers who would take their place by adoption.

Respectfully submitted this 22 day of 1978.

ROBERT H. SILK
Attorney for Appellant

Suite 1701
401 Broadway
New York, New York 10013
(212) 966-1545

In the Matter of the Adoption of DAVID A. C. (ANONYMOUS). KAZIM M. et al., Respondents; ABDIEL C., Appellant.

In the Matter of the Adoption of DENISE C. (ANONYMOUS). KAZIM M. et al., Respondents; ABDIEL C., Appellant.

Argued October 13, 1977; decided November 17, 1977

MEMORANDUM.

Appeal dismissed, with costs. The pruportedly direct and dispositive constitutional issues underlying this appeal are no more than a restatement of questions whose merit has been clearly resolved against appellant's position (Matter of Malpica-Orsini, 36 NY2d 568, app dsmd sub nom. Orsini v Blasi, 423 US 1042), and must be held to lack the degree of substantiality necessary to sustain this appeal as of right under CPLR 5601 (subd [b], par 1) (Tabankin v Codd, 40 NY2d 893; People ex rel. Uviller v Luger, 38 NY2d 854; see NY Const, art VI, § 3, subd b). Accordingly, it must be dismissed (Cohen and Karger, Powers of the New York Court of Appeals, § 55, p 254).

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur in memorandum.

Appeal dismissed.

STATE OF NEW YORK
COURT OF APPEALS,
STATE REPORTER'S OFFICE } ss.:

I, JAMES M. FLAVIN, State Reporter of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Matter of David A. C.

decided by the Court of Appeals on the 17th day of November, 19 77 with the official opinion rendered in such case, and I farther certify that the same is a true and correct copy of said opinion and of each and every part thereof.

IN WITNESS WHEREOF, I have hereunto affixed my signature as State Reporter, at the City of Albany, in the State of New York, this 13th day of March, 19 78

John T. Fitzpatrick
State Reporter of the State of New York

Attest:
L. S. Donald M. Sheraw
Clerk of the Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that ~~JOSEPH W. BELLACOSA~~ DONALD M. SHERAW deputy is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that ~~JAMES M. FLAVIN~~ JOHN T. FITZPATRICK is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Matter of David A. C.

decided by the said Court of Appeals on the 17th day of November, 19 77 is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of ~~JOSEPH W. BELLACOSA~~ DONALD M. SHERAW deputy, as clerk of said court, appended thereto is the true and genuine signature of said ~~JOSEPH W. BELLACOSA~~ DONALD M. SHERAW, and the signature of ~~JAMES M. FLAVIN~~ JOHN T. FITZPATRICK, as State Reporter, appended thereto is the true and genuine signature of said ~~JAMES M. FLAVIN~~ JOHN T. FITZPATRICK.

IN WITNESS WHEREOF, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall in the City of Albany and State of New York on the ..... day of ..... in the year one thousand nine hundred and .....

Chief Judge of the Court of Appeals of the State of New York

181 E
181 AE
182 E
182 AE

In the Matter of David Andrew C. (anonymous).

Kazim M. (anonymous) et al., respondents; Abdiel C. (anonymous), appellant.

In the Matter of Denise C. (anonymous).

Kazim M. (anonymous) et al., respondents; Abdiel C. (anonymous), appellant.

Danzig, Bunks & Silk, New York, N.Y. (Robert H. Silk and Abe Bunks of counsel), for appellant.

Morris Schulslaper, Brooklyn, N.Y., for respondents.

In two adoption proceedings, the putative father of the children appeals from four orders of the Surrogate's Court, Kings County, all dated September 10, 1976, and made after a hearing, two of which, inter alia, dismissed his objections to the respective adoptions and two of which approved the respective adoptions.

Orders affirmed, with one bill of costs to respondents.

Appellant contends that section 111 of the Domestic Relations Law is unconstitutional insofar as it denies to the putative father of a child born out of wedlock the same rights as to the approval of a proposed adoption as are enjoyed by the child's mother and by the father of a child born in wedlock. That very claim was found to be without merit in Matter of Malpica-Orsini (36 NY2d 568, app. dsmd. sub nom. Orsini v Blasi, 423 US 1042).

RABIN, Acting P.J., SHAPIRO, TITONE and O'CONNOR, JJ., concur.

February 22, 1977 — IN RE C., DAVID and DENISE (ANONYMOUS). M., KAZIM (ANONYMOUS); C., ABDIEL (ANONYMOUS). — 181 E, 181 AE, 182 E, 182 AE

A

B

Appendix C has not been refilmed. It is the Opinion of the Surrogate's Court which can be found at Page 27 of the Appendix.

Remittitur

Court of Appeals
State of New York

The Hon. Charles D. Breitel, Chief Judge, Presiding

2 No. 561

In the Matter of
David Andrew C. (Anonymous).
Kazim (Anonymous) &ano.,
Respondents.
Abdiel C. (Anonymous),
Appellant.

In the Matter of
Denise C. (Anonymous).
Kazim (Anonymous), &ano.,
Respondents.
Abdiel C. (Anonymous),
Appellant.

The appellant(s) in the above entitled appeal appeared by Danzig, Bunks & Silk;

the respondent(s) appeared by Morris Schulslaper.

The Court, after due deliberation, orders and adjudges that the appeal is dismissed, with costs, in a memorandum.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Surrogate's Court, Kings County,

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 17, 1977.

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the tenth *day of* January *A. D. 1978*

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

Mo. No. 1148
In the Matter of
the Adoption of David Andrew
C. (Anonymous), a Minor &c.,
by Kazim (Anonymous) et al.,
Respondents,
Abdiel C. (Anonymous),
Appellant.

In the Matter of the Adoption
of Denise C. (Anonymous), a
Minor &c., by Kazim (Anonymous)
et al.,
Respondents,
Abdiel C. (Anonymous),
Appellant.

A motion for reargument in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

E

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth *day of* February *A. D. 1978*

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

Mo. No. 111
In the Matter of
the Adoption of David Andrew
C. (Anonymous), a Minor &c.,
by Kazim (Anonymous) et al.,
Respondents,
Abdiel C. (Anonymous),
Appellant.

In the Matter of the Adoption
of Denise C. (Anonymous), a
Minor &c., by Kazim (Anonymous)
et al.,
Respondents,
Abdiel C. (Anonymous),
Appellant.

A motion for reargument in the above cause having heretofore been made upon the part of the appellant and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

F

STATE OF NEW YORK
COURT OF APPEALS

----------X

In the Matter of the Adoption of

DAVID ANDREW CABAN

A Minor under the age of Fourteen Years, by KAZIM MOHAMMED and MARIA MOHAMMED, his wife,

Appellees,

ABDIEL CABAN,

Appellant.

----------X No. 561

In the Matter of the Adoption of

DENISE CABAN

A Minor under the age of Fourteen Years, by KAZIM MOHAMMED and MARIA MOHAMMED, his wife,

Appellees,

ABDIEL CABAN,

Appellant.

----------X

Notice is hereby given that ABDIEL CABAN, the Appellant above-named hereby appeals to the Supreme Court of the United States from the final Judgment and Order of the Court of Appeals of the State of New York entered February 14, 1978, wherein that court denied Appellant's motion for reargument of the Judgment and Order of said Court of Appeals entered January 10,

G

1978, wherein that court denied Appellant's motion for reargument of the Judgment and Order of said Court of Appeals entered November 17, 1977, which Judgment and Order dismissed Appellant's appeal from the Order of the Appellate Division of the Supreme Court, Second Department, entered on or about February 22, 1977, which Order of the Appellate Division affirmed two Orders of the Surrogate's Court, Kings County, each entered on or about the 10th day of September, 1976, dismissing Appellant's objections to the adoption and approving the adoption of DAVID ANDREW CABAN, and which Order of the Appellate Division also affirmed two Orders of the Surrogate's Court, Kings County each entered on or about the 10th day of September, 1976, dismissing Appellant's objections tothe adoption and approving the adoption of DENISE CABAN; Appellant also appeals to the Supreme Court of the United States from the Judgment and Order of said Court of Appeals entered January 10th, 1978, wherein that court denied Appellant's motion for reargument of the said Judgment and Order of said Court of Appeals entered November 17, 1977; Appellant also appeals from the said initial Judgment and Order of said Court of Appeals entered November 17, 1977.

This appeal is taken pursuant to 28 USC Sect. 1257 (2).

PLEASE TAKE NOTICE that the Clerk of the Court of Appeals of the State of New York and the Clerk of the Surrogate's Court, Kings County, are each requested, pursuant to Rule 12 of the Rules of the Supreme Court of the United States, to certify the entire record and to provide for its transmission to the Clerk

of the Supreme Court of the United States.

Dated: New York, New York
March 9, 1978

Yours, etc.

ROBERT H. SILK
Attorney for Appellant.
Abdiel Caban

OFFICE & P.O. ADDRESS
401 Broadway
New York, New York 10013
(212) 966 1545

TO:

MORRIS SCHULSLAPER, ESQ.
Attorney for Appellees
16 Court Street
Brooklyn, New York 11201

CLERK NEW YORK STATE COURT OF APPEALS [filed 3/13/78, 3/22/78]

CLERK SURROGATE'S COURT, KINGS COUNTY [filed 3/10/78]

does not now, and despite the Appellate Division memorandum to the contrary, never did, challenge the Constitutionality of that statute. His claim to his children rests in the substantive natural rights of parents guaranteed by the 14th Amendment Due Process and Equal Protection clauses. Stanley v. Illinois, 405 U.S. 645; Matter of Bennett v. Jeffreys, 40 N.Y.2d 543.

The reach of Malpica-Orsini should not be construed to extend beyond its purpose, which was to uphold the Constitutionality of §111, in order to find that it impairs a basic substantive Constitutional right of parents expressed by the Supreme Court in Stanley v. Illinois. This is especially clear in the light of this Court's later decision, Matter of Bennett v. Jeffreys, 40 N.Y.2d 543. It was there held that Stanley lays down the "existing constitutional principles" in this area which the Courts of this State must observe. 40 N.Y.2d 545-6. In Matter of Goldman, 41 N.Y.2d 894, it has just been held that the Constitutional principles of Matter of Bennett apply to the construction of §111. Those principles as noted, come from Stanley.

It is often stated that adoption is a statutory matter. That is only to say that the right to adopt is of statutory origin and is strictly subject to legisla-

FROM APPELLANT'S BRIEF
COURT OF APPEALS

H

tively imposed conditions. But the right to keep one's own children is of Constitutional origin. Statutory adoptions are thus subject to parents' Constitutional rights, as expounded in Stanley v. Illinois, (see Matter of Goldman, 41 N.Y.2d 894; Rothstein v. Lutheran Social Services, 405 U.S. 1051).

The statute which simply gives rights to certain unfit mothers and married fathers beyond those found in the 14th Amendment would have to be construed as encroaching upon the existing substantive rights of fit unwed fathers, per Stanley v. Illinois, if the order below is to be affirmed. In fact, §111 does not provide that a child can be taken from a fit unwed father without his consent. The Court would have to read those words into it. It would require a strained interpretation to allow it that effect and render it unconstitutional thereby.

While this Court as obiter dictum in Malpica-Orsini, 36 N.Y.2d 570, did say that "the statute is explicit that no consent is required of the father of a child born out of wedlock," (citing Matter of Brousal, 66 Misc.2d 711, 712), this was not necessary to its holding that the statute was Constitutional. In fact, §111 does not directly refer to unwed fathers. The Surrogate's Court in Brousal had reasoned only on that basis that it

did not apply to them. As this Court stated, it does not. Appellant derives no right from it. He does not have to. While the statute does not apply, the Constitution does. That is the rock upon which Appellant rests.

It is hornbook that a legislative purpose to impair substantive 14th Amendment rights of parents will not be presumed. Most certainly is this true where such a purpose is clearly not compelled by the statutory language beyond a reasonable doubt (cf. Matter of Malpica-Orsini, 36 N.Y.2d 568, 570). This is one of the most fundamental canons of statutory construction (cf. People v. Finkelstein, 9 N.Y.2d 342, 345; Matter of James M.G., 86 Misc.2d 960).

The Constitution thus lays down the minimum standards that must be met to strip a father of a child born in or out of wedlock of his children and supplant him with another. This includes proof of his unfitness or other extraordinary circumstances elaborated in Stanley and Bennett. More than the minimum is granted to married fathers. No Constitutional barrier exists to this selective boon. As shown, it has been done by §111. But what the Courts below have done is to disregard the basic minimum Constitutional standards and displant Appellant as a father without a showing or finding of unfitness or

other extraordinary circumstance. This they are prohibited from doing by the Constitution. §111 is no magic lance by which to pierce the Constitutional shield and destroy protected parental rights.

POINT III.

APPROVAL OF ADOPTION BY THE MOTHER BUT DENIAL OF IT BY THE FATHER IS INVIDIOUS, DISCRIMINATORY, AND UNCONSTITUTIONAL.

The Courts below granted Petitioner Maria Mohammed's petition for adoption of her own children but gave short-shrift to their father's cross-petition. This violated his Constitutional right to equal protection of the laws. cf. Stanley v. Illinois, 405 U.S., 658.

If approval of the adoption by the stepfather, with its resultant termination of parental rights belonging to the natural father is held unlawful, then the natural father and natural mother should be left in the same jural relationship to their mutual children. Stanley taught that Court decisions which discriminate between parents on the basis of sex in this area violate the 14th Amendment, as well as do those that discriminate on the basis whether the children were born in wedlock. (405 U.S., 652, 658).

FROM APPELLANT'S BRIEF
COURT OF APPEALS

It should be noted that nowhere in their brief have Respondents pointed to any proof in the record or any finding below that Appellant was less than a fit and concerned father who has always loved and cared for his children -- the love being reciprocated by them -- to the extent permitted by the circumstances. More simply, to quote from Stanley v. Illinois, 405 U.S. 645, 655, "nothing in this record indicates that [Appellant] is or has been a neglectful father who has not cared for his children." Respondents' brief in effect confesses the lack of such proof or finding (Respondents' Brief, p.12).

But Respondents come back to Matter of Malpica-Orsini and that case concerns itself exclusively with the Constitutionality of Section 111. That statute in no way impairs any Constitutional right. For that reason, the United States Supreme Court dismissed the appeal (423 U.S. 1042).

At most, Section 111 requires that the supporting papers and proof include the consent of the father of children born in wedlock and of a mother to their adoption. To say that this is equivalent to permitting the father of a child born out of wedlock to be replaced by a stranger without a hearing on his own fitness is

FROM APPELLANT'S REPLY BRIEF
COURT OF APPEALS

NOTE: PAGINATION IS CORRECT.

to stretch and distort the statutory language so as to bring the legislation into conflict with the Fourteenth Amendment. It has not to this stage of the litigation been Appellant's position that the statute deserves such interpretation under the cannons of legislative construction.

However, should this Court find that Section 111 has that effect, the statute so construed could not then be squared with the Fourteenth Amendment and the Court should so declare. But nothing in Malpica-Orsini requires such a view of Section 111. For in that case, the natural father had conceded that the evidence would warrant the adoption and it could be decreed if the statute were Constitutional. He thereby forfeited the issue of his own fitness.

Clearly, the Court will not have to reach that point. By no reasonable process can a statute be stretched beyond its own plain words in order to encompass an Unconstitutional intent. The legislative branch, having enacted a Constitutional law, would have done so at peril of subsequent judicial gloss rendering the act invalid. Needless to say, that is not the way our system of separation of powers functions. Apparently recognizing this, Respondents would have this Court

drag an innocently framed statute through the mire of an Unconstitutional interpretation, and then proclaim it to be clean as it emerges from the bath.

As has been stated above, if the omission of a statutory right to notice to a father of children born out of wedlock and of his right to a hearing constituted a legislative negation of such rights, the statute would have been Unconstitutional for that reason alone. But in Malpica-Orsini, this Court found that the statutory omission did not negate the Constitutional right; that effect would be given to the latter without invalidating the legislation. Just as the Constitutional right to notice and to a hearing have been safeguarded despite legislative silence, so too has the Constitutionally mandated issue for the hearing -- the father's fitness -- been preserved. Appellant's rights have been transgressed by the Courts below, and not by any legislative act.

POINT II.

THE MERE GIVING OF NOTICE AND A RIGHT TO BE HEARD TO A FATHER OF A CHILD BORN OUT OF WEDLOCK IS NOT A COMPLETE FULFILLMENT OF THE CONSTITUTIONAL REQUIREMENT.

It has been pointed out both in this brief

Appendix I New York CPLR Section 5601, and Appendix J Rules of the New York Court of Appeals, Section 500.9 have not been filmed.

Appendix K Order of the Surrogate's Court dismissing Appellant's Objection and approving the adoption of David Andrew Caban can be found at Page 37 of the Appendix.

Appendix L Order of the Surrogate's Court dismissing Appellant's Objection and approving the adoption of Denise Caban can be found at Page 34 of the Appendix.

ADDITIONAL ORDER APPEALED FROM
(DAVID ANDREW CABAN)

14

FORM 306 2M 8-74 [illegible] 285

At a Surrogate's Court held in and for the County of Kings, City and State of New York in the Civic Center in said County, on the day SEP 10 1976 , 19

Present, Hon. NATHAN R. SOBEL, Surrogate

IN THE MATTER OF THE ADOPTION OF

DAVID ANDREW CABAN

a minor under the age of fourteen years

by KAZIM MOHAMMED and MARIA MOHAMMED, his wife

File No. 20007 19 76

Order Approving Adoption.

On the petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, adult s, duly verified the 13th day of January 1976, and duly reverified before me the day of SEP 10 1976, 19, and the affidavits of [illegible] and MORRIS SCHULSLAPER, ESQ.

duly sworn to before me the day of SEP 10 1976, 19 76 and the above named parties having severally appeared before me together with DAVID ANDREW CABAN, a minor under the age of fourteen years, and said parties constituting all the parties required to appear before me pursuant to the provisions of an Act relating to the domestic relations, constituting chapter fourteen of the Consolidated Laws, as amended, and said parties having been examined by me, as required by said law, and said parties having presented to me an instrument containing substantially the consents required by said law, an agreement on the part of the adoptive parents to adopt and treat the minor as their own lawful child, and a statement of the date and place of birth of the person to be adopted, as nearly as the same can be ascertained, the religious faith of the parents and of the child, the manner in which the adoptive parents obtained the child, and said instrument having been duly signed, verified and acknowledged as required by law by each person whose consent is necessary to the adoption.

M

M

ADDITIONAL ORDER APPEALED FROM (DAVID ANDREW CABAN)

and Narcissus Frett, having been specifically designated by me to make an investigation to verify the truth of the allegations set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding and such other facts relating to the said infant

DAVID ANDREW CABAN and to the adoptive parents as would give me full knowledge as to the desirability of approving said adoption, and the said investigator,

Narcissus Frett, having made her report in writing dated 5/28, 1976 and the same having been filed in this Court; and said investigator having reported that the facts and conditions as set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding are true and are fairly stated, and further reporting that in her opinion the adoption of said minor DAVID ANDREW CABAN, as prayed for in the petition herein would be for the best interests of said minor;

And it appearing to my satisfaction that the moral and temporal interests of the said minor DAVID ANDREW CABAN will be promoted by granting the petition of said KAZIM MOHAMMED and MARIA MOHAMMED, his wife, and approving the proposed adoption; and it appearing to my satisfaction that there is no reasonable objection to the change of name proposed, DAVID ANDREW MOHAMMED

NOW, ON MOTION OF MORRIS SCHULSLAPER, ESQ. Attorney for the petitioners herein, it is

ORDERED, that the petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, for the adoption of said minor born on the 16th day of July, 1969 in New York, New York be and the same hereby is granted and that such adoption and the agreement therefor submitted upon this application be and the same hereby are in all respects approved and it is

FURTHER ORDERED, that the minor, DAVID ANDREW CABAN, shall be henceforth regarded and treated in all respects as the child of said KAZIM MOHAMMED and MARIA MOHAMMED his wife, and be known and called by the name of DAVID ANDREW MOHAMMED

Surrogate.

-15-

ADDITIONAL ORDER APPEALED FROM (DENISE CABAN)

FORM 309 2M 8-74 (388)

At a Surrogate's Court held in and for the County of Kings, City and State of New York in the Civic Center in said County, on the day SEP 10 1976, 19

Present, Hon. NATHAN R. SOBEL, Surrogate

IN THE MATTER OF THE ADOPTION OF

DENISE CABAN

a minor under the age of fourteen years

by KAZIM MOHAMMED and MARIA MOHAMMED, his wife

File No. 20006 1976

Order Approving Adoption.

On the petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, adult s, duly verified the 13th day of January, 1976, and duly reverified before me the day of SEP 10 1976, 19, and the affidavits of ~~MARIA MOHAMMED and~~ MORRIS SCHULSLAPER, ESQ.

duly sworn to before me the day of SEP 10 1976, 19 76 and the above named parties having severally appeared before me together with DENISE CABAN, a minor under the age of fourteen years, and said parties constituting all the parties required to appear before me pursuant to the provisions of an Act relating to the domestic relations, constituting chapter fourteen of the Consolidated Laws, as amended, and said parties having been examined by me, as required by said law, and said parties having presented to me an instrument containing substantially the consents required by said law, an agreement on the part of the adoptive parents to adopt and treat the minor as their own lawful child, and a statement of the date and place of birth of the person to be adopted, as nearly as the same can be ascertained, the religious faith of the parents and of the child, the manner in which the adoptive parents obtained the child, and said instrument having been duly signed, verified and acknowledged as required by law by each person whose consent is necessary to the adoption.

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ADDITIONAL ORDER APPEALED FROM (DENISE CABAN)

and Narcissus Frett , having been specifically designated by me to make an investigation to verify the truth of the allegations set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding and such other facts relating to the said infant

DENISE CABAN and to the adoptive parents as would give me full knowledge as to the desirability of approving said adoption, and the said investigator, Narcissus Frett , having made her report in writing dated 5/28, 1976. and the same having been filed in this Court; and said investigator having reported that the facts and conditions as set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding are true and are fairly stated, and further reporting that in her opinion the adoption of said minor DENISE CABAN , as prayed for in the petition herein would be for the best interests of said minor;

And it appearing to my satisfaction that the moral and temporal interests of the minor DENISE CABAN will be promoted by granting the petition of said KAZIM MOHAMMED and MARIA MOHAMMED , his wife, and approving the proposed adoption; and it appearing to my satisfaction that there is no reasonable objection to the change of name proposed,

NOW, ON MOTION OF MORRIS SCHULSLAPER, ESQ. Attorney for the petitioners herein, it is

ORDERED, that the petition of KAZIM MOHAMMED and MARIA MOHAMMED , his wife, for the adoption of said minor born on the 12th day of March, 1971 in Brooklyn, New York be and the same hereby is granted and that such adoption and the agreement therefor submitted upon this application be and the same hereby are in all respects approved and it is

FURTHER ORDERED, that the minor, DENISE CABAN , shall be henceforth regarded and treated in all respects as the child of said KAZIM MOHAMMED and MARIA MOHAMMED his wife, and be known and called by the name of DENISE MOHAMMED

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Surrogate.

jm

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 22, 1977.

HON. SAMUEL RABIN, Acting Presiding Justice,
HON. J. IRWIN SHAPIRO,
HON. VITO J. TITONE,
HON. FRANK D. O'CONNOR. } Associate Justices

In the Matter of David Andrew C. (anonymous).

Kazim M. (anonymous) et al.,

Respondents;

Abdiel C. (anonymous),

Appellant.

Order on Appeals from Orders.

In the Matter of Denise C. (anonymous).

Kazim M. (anonymous) et al.,

Respondents;

Abdiel C. (anonymous),

Appellant.

In the above entitled causes, the above named Abdiel C. (anonymous), putative father and respondent in the court below, having appealed to this court from four orders of the Surrogate's Court, Kings County, all dated September 10, 1976, and made after a hearing, two of which, inter alia, dismissed his objections to the respective adoptions and two of which approved the respective adoptions; and the said appeals having been argued by Robert H. Silk, Esq., of counsel for the appellant and argued by Morris Schulslaper, Esq., of counsel for the respondents, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the orders appealed from are hereby unanimously affirmed, with one bill of costs to respondents.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division.

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6431

ABDIEL CABAN,

Appellant

—*v.*—

KAZIM MOHAMMED AND MARIA MOHAMMED,

Appellees

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

DOCKETED MARCH 27, 1978
PROBABLE JURISDICTION NOTED MAY 15, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6431

ABDIEL CABAN,

Appellant

—*v.*—

KAZIM MOHAMMED AND MARIA MOHAMMED,

Appellees

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 15, 1976—Petitions filed with Clerk, Surrogate's Court, Kings County.

February 26, 1976—Citations issued to Abdiel Caban by Surrogate's Court, Kings County.

March 8, 1976—Answers to Petitions and Cross-Petitions to adopt of Abdiel Caban and Nina Caban, filed with Clerk, Surrogate's Court, Kings County.

March 9, 1976—Answers of Kazim Mohammed and Maria Mohammed to Cross-Petitions filed with Clerk, Surrogate's Court, Kings County.

August 3, 1976—Opinion of Surrogate's Court, Kings County, filed with Clerk of that Court.

September 10, 1976—Orders of Adoption filed with Clerk, Surrogate's Court, Kings County.

September 30, 1976—Notices of Appeal by Abdiel Caban to Supreme Court of the State of New York, Appellate Division, Second Department, filed with Clerk of Surrogate's Court, Kings County.

February 22, 1977—Order of Affirmance by Appellate Division, Second Department, filed with Clerk of that Court.

February 22, 1977—Memorandum Opinion of Appellate Division, Second Department, filed with Clerk of that Court.

April 12, 1977—Notice of Appeal to Court of Appeals, State of New York, filed with Clerk of Surrogate's Court, Kings County.

November 17, 1977—Judgment of Court of Appeals dismissing appeal, filed with Clerk of that Court.

November 17, 1977—Memorandum Opinion of Court of Appeals, filed with Clerk of that Court.

January 10, 1978—Order of Court of Appeals denying Abdiel Caban's motion for reargument, filed with Clerk of that Court.

February 14, 1978—Order of Court of Appeals denying Abdiel Caban's second motion for reargument, filed with Clerk of that Court.

March 10, 1978—Notice of Appeal to Supreme Court of the United States, filed with Clerk of Surrogate's Court, Kings County.

March 13, 1978—Notice of Appeal to Supreme Court of the United States, filed with Clerk of Court of Appeals.

March 22, 1978—Notice of Appeal to Supreme Court of the United States, filed with Clerk of Court of Appeals.

March 27, 1978—Appellant's Jurisdiction Statement docketed with the Clerk of the Supreme Court of the United States.

May 15, 1978—Order of the Supreme Court of the United States granting Appellant's Motion for Leave to Proceed *In Forma Pauperis*.

May 15, 1978—Order of the Supreme Court of the United States noting probable jurisdiction of this case.

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File No. 20007, 1976

IN THE MATTER OF THE ADOPTION OF
DAVID ANDREW CABAN
a minor under the age of fourteen years, by
KAZIM MOHAMMED AND MARIA MOHAMMED, his wife

TO THE HONORABLE NATHAN R. SOBEL
Surrogate of Kings County:

PETITION—Filed January 16, 1976

The petition of KAZIM MOHAMMED and MARIA MOHAMMED his wife, respectfully shows:

1. That your petitioners are over the age of twenty-one years, citizens of the United States, and legally married, living together as husband and wife

2. That the post-office address and place of residence of your petitioners is 31 Ocean Parkway, Brooklyn, New York

3. That your petitioners are desirous of adopting as their own child DAVID ANDREW CABAN, a male minor child, born on the 16th day of July, 1969, at New York, New York

4. That the religious faith of said minor child is Catholic that the religious faith of the parents of said child, as petitioners are informed and verily believe is Catholic; that the religious faith of petitioner Kazim Mohammed is Christian; that the religious faith of petitioner Maria Mohammed is Catholic

5. That your petitioners' family residing with petitioners consist of Steven Kazim Mohammed, son, born on December 7, 1975.

6. The said minor child has resided continuously with petitioner Maria Mohammed (natural mother) since its birth, July 16, 1969 and with both petitioners since their marriage on January 30, 1974

7. That the occupation of your petitioner Kazim Mohammed is a taxicab driver employed by the Hector Taxi Corp., 27-39 - 86th Street, Brooklyn, New York and earns approximately $240.00 net weekly

8. That the parent of said minor child is Maria Mohammed nee Acevedo, the natural mother and petitioner herein; that the putative father is Abdiel Caban presently residing at #565 - 85th Street, Brooklyn, New York

8.A That Abdiel Caban has abandoned the child David Andrew Caban

9. That your petitioner obtained custody of the minor child in the following manner: That the petitioner Maria Mohammed nee Acevedo is the natural mother of the minor child herein

10. That said child has no property or means of support

11. That said minor child has no general or testamentary guardian

12. That there are no persons other than those mentioned interested in this proceeding, to the best of your petitioners' information and belief, except Abdiel Caban, the putative father

13. That all persons above named are of full age except the minor herein and that all of the parties are of sound mind

14. That the person, whose adoption is sought herein, has not been previously adopted

15. That no previous application for the relief prayed for herein has been made to any court or judge

WHEREFORE, your petitioners pray for an order approving the adoption of said DAVID ANDREW CABAN by your petitioners and directing that the said DAVID ANDREW CABAN shall henceforth be regarded and treated in all respects as the child of your petitioners and be known and called by the name of DAVID ANDREW MOHAMMED

/s/ Kazim Mohammed
/s/ Maria Mohammed

[Affidavit of Petitioners and Jurat (Omitted in Printing)]

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File No. 20006, 1976

IN THE MATTER OF THE ADOPTION OF
DENISE CABAN
a minor under the age of fourteen years, by
KAZIM MOHAMMED AND MARIA MOHAMMED, his wife

TO THE HONORABLE NATHAN R. SOBEL
Surrogate of Kings County:

PETITION—Filed January 15, 1976

The petition of KAZIM MOHAMMED and MARIA MOHAMMED his wife, respectfully shows:

1. That your petitioners are over the age of twenty-one years, citizens of the United States, and legally married, living together as husband and wife

2. That the post-office address and place of residence of your petitioners is 31 Ocean Parkway, Brooklyn, New York

3. That your petitioners are desirous of adopting as their own child DENISE CABAN, a female minor child, born on the 12th day of March, 1971, at Brooklyn, New York

4. That the religious faith of said minor child is Catholic that the religious faith of the parents of said child, as petitioners are informed and verily believe is Catholic; that the religious faith of petitioner Kazim Mohammed is Christian; that the religious faith of petitioner Maria Mohammed is Catholic

5. That your petitioners' family residing with petitioners consist of Steven Kazim Mohammed, son, born on December 17, 1975

6. That said minor child has resided continuously with petitioner Maria Mohammed (natural mother) since her birth, March 12, 1971 and with both petitioners since their marriage on January 30, 1974

7. That the occupation of your petitioner Kazim Mohammed is a taxicab driver employed by the Hector Taxi Corp., 27-39 - 86th Street, Brooklyn, New York and earns approximately $240.00 net weekly

8. That the parent of said minor child is Maria Mohammed nee Acevedo, the natural mother and petitioner herein; that the putative father is Abdiel Caban presently residing at #565 - 85th Street, Brooklyn, New York

8.A That Abdiel Caban has abandoned the child Denise Caban

9. That your petitioner obtained custody of the minor child in the following manner: That the petitioner Maria Mohammed nee Acevedo is the natural mother of the minor child herein

10. That said minor child has no property or means of support

11. That said minor child has no general or testamentary guardian

12. That there are no persons other than those herein interested in this proceeding, to the best of your petitioners' information and belief, except Abdiel Caban, the putative father

13. That all persons above named are of full age except the minor herein and that all of the parties are of sound mind

14. That the person, whose adoption is sought herein, has not been previously adopted

15. That no previous application for the relief prayed for herein has been made to any court or judge

WHEREFORE, your petitioners pray for an order approving the adoption of said DENISE CABAN by your petitioners, and directing that the said DENISE CABAN shall henceforth be regarded and treated in all respects as the child of your petitioners and be known and called by the name of DENISE MOHAMMED

/s/ Kazim Mohammed
/s/ Maria Mohammed

[Affidavit of Petitioners and Jurat (Omitted in Printing)]

IN THE SURROGATE'S COURT
KING'S COUNTY, NEW YORK

File No. 20007, 1976

CITATION

The People of The Sate of New York
By the Grace of God Free and Independent

To ABDIEL CABAN
565 - 85th Street
Brooklyn, New York

Send Greeting:

A petition having been filed by KAZIM MOHAMMED and MARIA MOHAMMED who are domiciled at 31 Ocean Parkway, Brooklyn, New York, praying for an order approving the adoption of DAVID ANDREW CABAN by the petitioners named in the said petition, KAZIM MOHAMMED and MARIA MOHAMMED, husband and wife, and directing that the said minor child shall henceforth be treated and regarded in all respects as the child of the petitioners and be known and called by the name of DAVID ANDREW MOHAMMED

YOU ARE HEREBY CITED TO SHOW CAUSE before the Surrogate's Court, Kings County, at the Court House, Civic Centre, 2 Johnson Street, Brooklyn, New York, on March 11th, 1976, at 9:30 A.M., why an order should not be made granting such petition for adoption by the said petitioners and a further order determining that Abdiel Caban has abandoned said minor child and dispensing with his consent to the adoption of said minor child by the petitioners.

Dated, Attested and Sealed, February 26th, 1976.

[L.S.]

HON. NATHAN R. SOBEL
Surrogate

/s/ Kevin C. Fogarty
Clerk

Name of Attorney—Morris Schulslaper

Tel. No.—212-624-7232

Address—16 Court Street, Brooklyn, New York 11241

This Citation is served upon you as required by law. You are not obliged to appear in person. If you fail to appear it will be assumed that you consent to the proceedings, unless you file written objections thereto. You have a right to have an attorney-at-law appear for you.

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File No. 20006, 1976

CITATION

The People of The State of New York
By the Grace of God Free and Independent

To ABDIEL CABAN
565 - 85th Street
Brooklyn, New York

Send Greeting:

A petition having been filed by KAZIM MOHAMMED and MARIA MOHAMMED who are domiciled at 31 Ocean Parkway, Brooklyn, New York, praying for an order approving the adoption of DENISE CABAN by the petitioners named in the said petition, KAZIM MOHAMMED, husband and wife, and directing that the said minor child shall henceforth be treated and regarded in all respects as the child of the petitioners and be known and called by the name of DENISE MOHAMMED

YOU ARE HEREBY CITED TO SHOW CAUSE before the Surrogate's Court, Kings County, at the Court House, Civic Centre, 2 Johnson Street, Brooklyn, New York, on March 11th 1976, at 9:30 A.M., why an order should not be made granting petition for adoption by the said petitioners and a further order determining that Abdiel Caban has abandoned said minor child and dispensing with his consent to the adoption of said minor child by the petitioners.

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IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File No. 20007/1976

IN THE MATTER OF THE ADOPTION OF
DAVID ANDREW CABAN
a minor under the age of fourteen years by
KAZIM MOHAMMED AND MARIA MOHAMMED, his wife

ANSWER TO PETITION OF ABDIEL CABAN, NATURAL FATHER OF THE INFANT, DAVID ANDREW CABAN, AND CROSS-PETITION OF ABDIEL CABAN AND HIS WIFE, NINA CABAN—Filed March 8, 1976

The natural father, ABDIEL CABAN, and his wife, NINA CABAN, answering the verified petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, states as follows:

FIRST: Denies each and every allegation contained in paragraphs numbered and designated as "6" and "8A".

SECOND: Denies having knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs numbered and designated as "1", "2", "3", "4", "5", "7", "9", "10", "11", "12", "13" and "15".

AS AND FOR A CROSS-PETITION FOR THE ADOPTION OF DAVID ANDREW CABAN, BY ABDIEL CABAN, THE NATURAL FATHER, AND NINA CABAN, HIS WIFE.

The Cross-Petitioners herein allege as follows:

1. That I, ABDIEL CABAN, one of the cross-petitioners herein, am the natural father and MARIA MOHAMMED is the mother of the infant, DAVID ANDREW CABAN.

2. That I and petitioner, MARIA MOHAMMED, lived together as husband and wife from about July of 1968 until some time in late March of 1974.

3. That on July 16, 1969, about one year after I began living with petitioner, MARIA MOHAMMED, my child, DAVID ANDREW CABIN, was born of the relationship between petitioner MARIA MOHAMMED and myself, and we gave the child my surname.

4. That during all the period of time petitioner MARIA MOHAMMED and I lived together, although not legally married, we held ourselves out to the world as being husband and wife, living together as such.

5. That during all that period of time, I supported, cared for and loved my child, DAVID ANDREW CABAN, who bore my name.

6. That during all that period of time, I fully acknowledged the paternity of my child, DAVID ANDREW CABAN, to the entire world.

7. That in late March of 1974, the petitioner MARIA MOHAMMED left the apartment that she resided in with me at 185 St. Mark's Avenue, Brooklyn, New York, without explanation, taking my child, DAVID ANDREW CABAN, with her.

8. That I pleaded with the said MARIA MOHAMMED to return with my child DAVID ANDREW CABAN and to continue to live with me so that I could continue to participate in the care, up-bringing and love of my child, DAVID ANDREW CABAN, but the said MARIA MOHAMMED refused.

9. That on January 30, 1974, upon information and belief, and unbeknownst to me, the said MARIA MOHAMMED married her present husband and co-petitioner, KAZIM MOHAMMED.

10. That from the time of such alleged marriage, until late March of 1974, when the said MARIA MOHAMMED left my household without justification, the petitioner, MARIA MOHAMMED, continued to reside with me as husband and wife, despite her allegation that she married the co-petitioner, KAZIM MOHAMMED, on January 30, 1974.

11. That during the period of late March, 1974 when the said MARIA MOHAMMED left our apartment at 185 St. Mark's Avenue, Brooklyn, New York, until the end of June, 1974, the said MARIA MOHAMMED delivered my child, DAVID ANDREW CABAN, to me for weekends, bringing him on Friday evening and picking him up on Sunday evening. During these periods, I gave my child all the care and attention which I could as a loving father, completely attending to my child's every need.

12. That during the period of time between petitioner MARIA MOHAMMED'S leaving our apartment in late March, 1974 up to the end of June 1974, I pleaded with the said MARIA MOHAMMED to return home with my child, DAVID ANDREW CABAN, and in this connection, proposed marriage to the petitioner, MARIA MOHAMMED, all to no avail.

13. That to show my good faith in making such offer of marriage to petitioner MARIA MOHAMMED, I obtained a divorce from my first wife, from whom I had been separated for some fourteen years prior to June of 1974.

14. That said divorce was duly granted to me in the month of June, 1974.

15. That these weekend visits with my child, DAVID ANDREW CABAN, ceased around the end of June, 1974, when the petitioner MARIA MOHAMMED disappeared with the child, DAVID ANDREW CABAN.

16. That I later learned that the petitioner, MARIA MOHAMMED, nad spirited my child out of the country and sent my child to Puerto Rico to live, not with petitioner MARIA MOHAMMED, but with her parents. This deprived my child of both its parents. She took the child away from his father and, rather than care for him as the mother, she sent him away so that the child would have neither a father or a mother to take care of him.

17. That sometime in October of 1974, I learned of the whereabouts of my child from my own parents, who

reside in Puerto Rico, and who advised me that my child, DAVID ANDREW CABAN, was then living with petitioner MARIA MOHAMMED'S mother in Puerto Rico.

18. Thereafter I carried on and received correspondence with and from my parents so as to keep abreast of the whereabouts and welfare of my child, DAVID ANDREW CABAN.

19. My child, DAVID ANDREW CABAN, continued to reside in Puerto Rico, away from both of his natural parents, until November of 1975, when I assumed custody over my child, DAVID ANDREW CABAN, not as against his mother, who had abandoned the said child and remained away from him in New York while he was in Puerto Rico, but as against his maternal grandmother.

20. My child, DAVID ANDREW CABAN, resided with me and my present wife, NINA CABAN, who joins in this cross-petition for adoption, until January 15, 1976, when by order of the Family Court dated January 15, 1976, custody of my child, DAVID ANDREW CABAN, was temporarily given to the said MARIA MOHAMMED pending a hearing as to permanent custody.

21. During the period when I had custody of my child, DAVID ANDREW CABAN, I cared for, supported, loved, educated, provided clothing, medical care, and I provided for my child's every need.

22. That the said order of the Family Court provided for visitation by me on Sundays between 11:00 A.M. to 6:00 P.M., which visitation has been exercised and enjoyed by both father and child on each and every Sunday to date.

23. That I am gainfully employed and ready, willing and able to support and care for my child, DAVID ANDREW CABAN.

24. That my child, DAVID ANDREW CABAN, loves me as his father as I love him as my child, and he also loves my wife, NINA CABAN, and would prefer me and

my wife as parents, and, upon information and belief, wishes to live with me and my wife, NINA CABAN.

25. That my said child and my wife, NINA CABAN, have already established a warm loving and caring relationship with each other.

26. That my wife, NINA CABAN, is not employed outside the home, and is ready, willing and able to devote full time to the caring and up-bringing of my child and to in all respects be a loving mother to the said child.

27. That I and my wife, NINA CABAN, are in the process of purchasing a private home in Queens County, having seven rooms in all, including four bedrooms, a full basement and expansion attic, which will have ample room to accommodate my child DAVID ANDREW CABAN.

28. That I verily believe that the best interests of my child, DAVID ANDREW CABAN, will be served by granting me permanent custody of my child, DAVID ANDREW CABAN, by permitting the adoption of the said child by me and my wife, NINA CABAN, and by denying the petition of MARIA MOHAMMED and her husband, KAZIM MOHAMMED herein.

WHEREFORE, your cross-petitioner pray for an order denying the petition of MARIA MOHAMMED and KAZIM MOHAMMED and granting the cross-petition for adoption of my son, DAVID ANDREW CABAN, by me and my wife, NINA CABAN, for all of which relief no previous application has been made.

Dated: New York, New York
March 4, 1976

/s/ Abdiel Caban
ABDIEL CABAN

/s/ Nina Caban
NINA CABAN

[Affidavit of Respondents
and Jurat (Omitted in Printing)]

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File No. 20006/1976

IN THE MATTER OF THE ADOPTION OF
DENISE CABAN
a minor under the age of fourteen years by
KAZIM MOHAMMED AND MARIA MOHAMMED, his wife

ANSWER TO PETITION OF ABDIEL CABAN, NATURAL FATHER OF THE INFANT, DENISE CABAN, AND CROSS-PETITION OF ABDIEL CABAN AND HIS WIFE, NINA CABAN—Filed March 8, 1976

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FIRST: Denies each and every allegation contained in paragraphs numbered and designated as "6" and "8A".

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AS AND FOR A CROSS-PETITION FOR THE ADOPTION OF DENISE CABAN, BY ABDIEL CABAN, THE NATURAL FATHER, AND NINA CABAN HIS WIFE

The Cross-Petitioners herein alleged as follows:

1. That I, ABDIEL CABAN, one of the cross-petitioners herein, am the natural father and MARIA MOHAMMED is the mother of the infant, DENISE CABAN.

2. That I and petitioner, MARIA MOHAMMED, lived together as husband and wife from about July of 1968 until some time in late March of 1974.

3. That on March 12, 1971, about two and one-half years after I began living with petitioner, MARIA MOHAMMED, my child, DENISE CABAN, was born of the relationship between petitioner MARIA MOHAMMED and myself, and we gave the child my surname.

4. That during all the period of time petitioner MARIA MOHAMMED and I lived together, although not legally married, we held ourselves out to the world as being husband and wife, living together as such.

5. That during all that period of time, I supported, cared for and loved my child, DENISE CABAN, who bore my name.

6. That during all that period of time, I fully acknowledged the paternity of my child, DENISE CABAN, to the entire world.

7. That in late March of 1974, the petitioner MARIA MOHAMMED left the apartment that she resided in with me at 185 St. Mark's Avenue, Brooklyn, New York, without explanation, taking my child, DENISE CABAN with her.

8. That I pleaded with the said MARIA MOHAMMED to return wtih my child DENISE CABAN and to continue to live with me so that I could continue to participate in the care, upbringing and love of my child, DENISE CABAN, but the said MARIA MOHAMMED refused.

9. That on January 30, 1974, upon information and belief, and unbeknownst to me, the said MARIA MOHAMMED married her present husband and co-petitioner, KAZIM MOHAMMED.

10. That from the time of such alleged marriage, until late March of 1974, when the said MARIA MOHAMMED left my household without justification, the petitioner, MARIA MOHAMMED, continued to reside with me as husband and wife, despite her allegation that she married the co-petitioner, KAZIM MOHAMMED, on January 30, 1974.

11. That during the period of late March, 1974 when the said MARIA MOHAMMED left our apartment at 185 St. Mark's Avenue, Brooklyn, New York, until the end of June, 1974, the said MARIA MOHAMMED delivered my child, DENISE CABAN, to me for weekends, bring her on Friday evening and picking her up on Sunday evening. During these periods, I gave my child all the care and attention which I could as a loving father, completely attending to my child's every need.

12. That during the period of time between petitioner MARIA MOHAMMED'S leaving our apartment in late March, 1974 up to the end of June 1974, I pleaded with the said MARIA MOHAMMED to return home with my child, DENISE CABAN, and in this connection, proposed marriage to the petitioner, MARIA MOHAMMED, all to no avail.

13. That to show my good faith in making such offer of marriage to petitioner MARIA MOHAMMED, I obtained a divorce from my first wife, from whom I had been separated for some fourteen years prior to June of 1974.

14. That said divorce was duly granted to me in the month of June, 1974.

15. That these weekend visits with my child, DENISE CABAN, ceased around the end of June, 1974, when the petitioner MARIA MOHAMMED disappeared with the child, DENISE CABAN.

16. That I later learned that the petitioner, MARIA MOHAMMED, had spirited my child out of the country and sent my child to Puerto Rico to live, not with petitioner MARIA MOHAMMED, but with her parents. This deprived my child of both its parents. She took the child away from her father and, rather than care for her as the mother, she sent her away so that the child would have neither a father or a mother to take care of her.

17. That sometime in October of 1974, I learned of the whereabouts of my child from my own parents, who

reside in Puerto Rico, and who advised my that my child, DENISE CABAN, was then living with petitioner MARIA MOHAMMED'S mother in Puerto Rico.

18. Thereafter I carried on and received correspondence with and from my parents so as to keep abreast of the whereabouts and welfare of my child, DENISE CABAN.

19. My child, DENISE CABAN, continued to reside in Puerto Rico, away from both of her natural parents, until November of 1975, when I assumed custody over my child, DENISE CABAN, not as against her mother, who had abandoned the said child and remained away from her in New York while she was in Puerto Rico, but as against her maternal grandmother.

20. My child, DENISE CABAN, resided with me and my present wife, NINA CABAN, who joins in this cross-petition for adoption, until January 15, 1976, when by order of the Family Court dated January 15, 1976, custody of my child, DENISE CABAN, was temporarily given to the said MARIA MOHAMMED pending a hearing as to permanent custody.

21. During the period when I had custody of my child, DENISE CABAN, I cared for, supported, loved, educated, provided clothing, medical care, and I provided for my child's every need.

22. That the said order of the Family Court provided for visitation by me on Sundays between 11:00 A.M. to 6:00 P.M., which visitation has been exercised and enjoyed by both father and child on each and every Sunday to date.

23. That I am gainfully employed and ready, willing and able to support and care for my child, DENISE CABAN.

24. That my child, DENISE CABAN, loves me as her father as I love her as my child, and she also loves my wife, NINA CABAN, and would prefer me and my wife as parents, and, upon information and belief, wishes to live with me and my wife, NINA CABAN.

25. That my said child and my wife, NINA CABAN, have already established a warm loving and caring relationship with each other.

26. That my wife, NINA CABAN, is not employed outside the home, and is ready, willing and able to devote full time to the caring and up-bringing of my child and to in all respects be a loving mother to the said child.

27. That I and my wife, NINA CABAN, are in the process of purchasing a private home in Queens County, having seven rooms in all, including four bedrooms, a full basement and expansion attic, which will have ample room to accommodate my child, DENISE CABAN.

28. That I verily believe that the best interests of my child, DENISE CABAN, will be served by granting me permanent custody of my child, DENISE CABAN, by permitting the adoption of the said child by me and my wife, NINA CABAN, and by denying the petition of MARIA MOHAMMED and her husband, KAZIM MOHAMMED herein.

WHEREFORE, your cross-petitioners pray for an order denying the petition of MARIA MOHAMMED and KAZIM MOHAMMED and granting the cross-petition for adoption of my daughter, DENISE CABAN, by me and my wife, NINA CABAN, for all of which relief no previous application has been made.

Dated: New York, New York
March 4, 1976

/s/ Abdiel Caban
ABDIEL CABAN

/s/ Nina Caban
NINA CABAN

[Affidavit of Respondents and Jurat
(Omitted in Printing)]

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File #20006/76

IN THE MATTER OF THE ADOPTION OF
DAVID ANDREW CABAN
a minor under the age of fourteen years by
KAZIM MOHAMMED AND MARIA MOHAMMED, his wife

ANSWER TO THE CROSS-PETITION OF
ABDIEL CABAN and NINA CABAN
Filed March 9, 1976

MARIA MOHAMMED, the mother of DAVID ANDREW CABAN and KAZIM MOHAMMED, her lawfully wedded husband, by their attorney, MORRIS SCHULSLAPER, ESQ., in answer to the cross-petition of ABDIEL CABAN, reputedly the father of the child and NINA CABAN, respectfully set forth to the court as follows:

FIRST: Denies each and every allegation set forth in paragraph of the cross-petition marked and designated "I" except to admit that Maria Mohammed, the petitioner is the mother of David Andrew Caban.

SECOND: Denies each and every allegation set forth in paragraphs of the cross-petition marked "2", "3", "4", "5" and "6" except to admit that the child, DAVID ANDREW CABAN was born to the petitioner Maria Mohammed on July 16, 1969; that a certain certificate of birth for the said child records, by the sole act of the petitioner, the name of ABDIEL CABAN as the father; that at the time of the child's birth the petitioner, Maria Mohammed and the cross-petitioner, Abdiel Caban together occupied a premises located at 186 St. Marks Avenue, Brooklyn, New York.

THIRD: Denies each and every allegation contained in paragraphs of the cross-petition marked and designated "7", "8", "10", "11", "12" except to admit that, in on or about the latter part of the year 1973 the pe-

titioner, Maria Mohammed, together with her child, DAVID ANDREW CABAN, left the premises 185 St. Marks Avenue, Brooklyn, New York.

FOURTH: Denies each and every allegation contained in paragraphs of the cross-petition marked and designated "19", "20", "22" and "28" except to admit that on or about the 22nd day of November, 1975 the said Abdiel Caban and/or Nina Caban, and/or, on information and belief, other persons acting on their behalf and instigation, without judicial process or order but by trick, device, show and/or force of arms, captivated, detained the child, DAVID ANDREW CABAN and absconded with the infant from the home of his maternal grandmother in Puerto Rico where he was lawfully, although temporarily sojourning; that the said Abdiel Caban and Nina Caban secreted the said child from the petitioner and her husband, Kazim Mohammed, denied her information and all access to the child; physically and forcibly detained the said child from the petitioners; proclaimed, by self assumed authority, custody of the said child; that only in response to an order of the Family Court of the State of New York by the petitioner-mother made, was the custody of the child returned to her on January 15, 1976; that at no time, other than between November 22, 1975, when the cross-petitioner, by an act of violent self help, without legal authority or process and without seeking such legal authority or process secreted the child from his mother/petitioner, did the said Abdiel Caban have custody of DAVID ANDREW CABAN in law or fact; that, on January 15, 1975 only upon the petitioner consenting, the Family Court of the State of New York, County of Kings, allowed, pending a full hearing before it, the cross-petitioner/putative father, Abdiel Caban, the right to visit with the said child, DAVID ANDREW CABAN.

FIFTH: Denies each and every allegation contained in paragraph of the cross-petition marked and designated "15" and specifically denies that the petitioner, Maria Mohammed disappeared with the child, DAVID ANDREW CABAN.

SIXTH: Denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs of the cross-petition marked and designated "13", "14", "17", "18", "21", "23", "25", "26" and "27".

WHEREFORE, the petitioners respectfully pray for an order dismissing the cross-petition of ABDIEL CABAN, the reputed father of DAVID ANDREW CABAN and NINA CABAN and; the consent of the said ABDIEL CABAN thereto not being statutorily required, that his objection to the herein petition for the adoption of DAVID ANDREW CABAN be dismissed; that the petition for the adoption of the said child proceed accordingly and; for such other and further relief as may recommend itself to the court.

MORRIS SCHULSLAPER
Attorney for Petitioners,
Kazim and Maria Mohammed

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File #20006/76

IN THE MATTER OF THE ADOPTION OF
DENISE CABAN
a minor under the age of fourteen years
by KAZIM MOHAMMED and MARIA MOHAMMED, his wife

ANSWER TO THE CROSS-PETITION OF
ABDIEL CABAN and NINA CABAN
Filed March 9, 1976

MARIA MOHAMMED, the mother of DENISE CABAN and KAZIM MOHAMMED, her lawfully wedded husband, by their attorney, MORRIS SCHULSLAPER, ESQ., in answer to the cross-petition of ABDIEL CABAN, reputedly the father of the child and NINA CABAN, respectfully set forth to the court as follows:

FIRST: Denies each and every allegation set forth in paragraph of the cross-petition marked and designated "1" except to admit that Maria Mohammed, the petitioner is the mother of Denise Caban.

SECOND: Denies each and every allegation set forth in paragraphs of the cross-petition marked "2", "3", "4", "5" and "6" except to admit that the child, DENISE CABAN was born to the petitioner Maria Mohammed on March 12, 1971; that a certain certificate of birth for the said child records, by the sole act of the petitioner, the name of ABDIEL CABAN as the father; that at the time of the child's birth the petitioner, Maria Mohammed and the cross-petitioner, Abdiel Caban together occupied a premises located at 185 St. Marks Avenue, Brooklyn, New York.

THIRD: Denies each and every allegation contained in paragraphs of the cross-petition marked and designated "7", "8", "10", "11", "12" except to admit that, in, on or about the latter part of the year 1973 the petitioner,

Maria Mohammed, together with her child, DENISE CABAN, left the premises 185 St. Marks Avenue, Brooklyn, New York.

FOURTH: Denies each and every allegation contained in paragraphs of the cross-petition marked and designated "19", "20", "22" and "28" except to admit that on or about the 22nd day of November, 1975 the said Abdiel Caban and/or Nina Caban, and/or, on information and belief, other persons acting on their behalf and instigation, without judicial process or order but by trick, device, show and/or force of arms, captivated, detained the child, DENISE CABAN and absconded with the infant from the home of her maternal grandmother in Puerto Rico where she was lawfully, although temporarily sojourning; that the said Abdiel Caban and Nina Caban secreted the said child from the petitioner and her husband, Kazim Mohammed, denied her information and all access to the child; physically and forcibly detained the said child from the petitioners, proclaimed, by self assumed authority, custody of the said child; that only in response to an order of the Family Court of the State of New York by the petitioner-mother made, was the custody of the child returned to her on January 15, 1976; that at no time, other than between November 22, 1975 when the cross-petitioner, by an act of violent self help, without legal authority or process and without seeking such legal authority or process secreted the child from his mother/petitioner, did the said Abdiel Caban have custody of DENISE CABAN in law or fact; that, on January 15, 1975 only upon the petitioner consenting, the Family Court of the State of New York, County of Kings, allowed, pending a full hearing before it, the cross-petitioner/putative father, Abdiel Caban, the right to visit with the said child, DENISE CABAN.

FIFTH: Denies each and every allegation contained in paragraph of the cross-petition marked and designated "15" and specifically denies that the petitioner, Maria Mohammed disappeared with the child, DENISE CABAN.

SIXTH: Denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations

contained in paragraphs of the cross-petition marked and designated "13", "14", "17", "18", "21", "23", "25", "26" and "27".

WHEREFORE, the petitioners respectfully pray for an order dismissing the cross-petition of ABDIEL CABAN, the reputed father of DENISE CABAN and NINA CABAN and; the consent of the said ABDIEL CABAN thereto not being statutorily required, that his objection to the herein petition for the adoption of DENISE CABAN be dismissed; that the petition for the adoption of the said child proceed accordingly and; for such other and further relief as may recommend itself to the court.

MORRIS SCHULSLAPER
Attorney for Petitioners,
Kazim and Maria Mohammed

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File No. 2006-1976
File No. 2007-1976

IN THE MATTER OF THE ADOPTIONS OF
DAVID ANDREW CABAN and DENISE CABAN,
minors under the age of fourteen years by
KAZIM MOHAMMED and MARIA MOHAMMED, his wife

OPINION—August 3, 1976

SOBEL, S.

The stepfather, married since January 1974 to the natural mother of David (age 7) and Denise (age 5), petitions for their adoption.

The adoption is opposed by the putative father of the two children. Although a putative father's consent to such an adoption is not a legal necessity, he is entitled to an opportunity to be heard in opposition to the proposed stepfather adoption. (Stanley v. Illinois, 405 U.S. 645; Matter of Malpica-Orsini, 36 N Y 2d 568).

What considerations enter into such a hearing?

When the proposed adoptive parents are both blood strangers to the adoptive child and the objecting putative father is himself proposing to adopt, then a modified "flicker of interest rule" should be applied. (See Matter of Susan W. v. Talbot, 34 N Y 2d 76, 80.)

However, quite a different situation is presented when the putative father opposes the adoption by the stepfather married to the natural mother having custody of the child. A putative father opposing such an adoption, without the consent of the natural mother, has himself no prospect of adopting the child. His motive in opposing the adoption is therefore an important consideration. As this Court has noted, too often the continued interest is not in the

child but rather in the natural mother and whether such interest is labelled "love" or "hatred"—it really makes little difference—the purpose is to preserve in some manner, however oblique, the dissolved former relationship. Motive however is very difficult for a court to discern for often the objecting father is not himself consciously aware of it.

Whatever the motive for the opposition to the adoption, the consequences are the same—harassment of the natural mother in her new relationship and embarrassment to the child who though living with and being supported in the new family may not in school and elsewhere bear the family name.

The prime objective of allowing a putative father to be heard is therefore not to determine the degree of his continued interest in the child but rather to determine the best interests of the child. Any evidence the putative father may offer concerning the solidity of the marriage and the concern and treatment of the child in the new family is particularly relevant.

The background facts are therefore only briefly noted.

The natural mother and putative father lived together from 1968 through 1973. During this period the putative father was married but separated from his first wife whom he had married in 1955 and by whom he had two daughters. During this entire relationship both the natural mother and the putative father were employed and contributed to the support of the family.

In January of 1974, the natural mother left the putative father to marry the petitioner (1/30/74). He was aware of the former relationship and accepted the two children.

After the marriage, the putative father continued to see the two children who frequently visited with the maternal grandmother with whom he had a good relationship.

In late 1974 or early 1975 the maternal grandmother moved to Puerto Rico and the two children accompanied

her. The natural mother and petitioning stepfather planned permanently to join the children there after their own child which she was expecting was born.

The putative father during this period requested and received permission to visit with the children during his visits to his own family in Puerto Rico. During one of these visits, instead of returning the children to the maternal grandmother, he brought them back with him to New York, concealing their whereabouts. He did however consult an attorney who communicated to the natural mother a proposal that each have custody of one of the children. From the attorney, the natural mother and petitioning stepfather obtained the address of the children. Their attempts with the aid of the police to regain custody was frustrated again by the removal of the children to a new address. A proceeding in the Family Court resulted in temporary custody being awarded to the mother. The hearing has been adjourned pending the outcome of these adoption proceedings.

The natural mother and the petitioning stepfather have been married since January 1974. They are both in their early twenties. They have had a child in 1975. Both are employed, the natural mother as a secretary earning $200 a week, the petitioning stepfather as a taxi driver earning $250 a week. The children are not old enough to be articulate; the oldest is able however to express "love" for both his "fathers." The children are obviously well cared for.

The objecting putative father is 39 years of age. As noted he was married in 1955 and has two daughters by his first wife ages 16 and 20, whom he testifies he supports. He testifies that he has been divorced from his first wife and has recently remarried a widow with two children. He is employed by the Telephone Company at a salary of $268 a week and supports his new wife and family. He justifies his conduct in removing the children

without permission from their lawful custody by his concern for their welfare. His testimony is belied by the appearance and credible testimony of the maternal grandmother from whose temporary custody the children were snatched.

There is absolutely no evidence, credible or otherwise, that the new marriage of the natural mother is other than solid or permanent; and no evidence whatsoever that the children are not well cared for and healthy. Nothing therefore justifies a denial of the petition other than that the putative father professes that he loves the children and fervently desires that they continue to bear his name. This is not enough however sincerely motivated.

The contention that the natural mother "abandoned" the children by permitting the children to accompany their grandmother to Puerto Rico is dismissed. Not a scintilla of evidence supports such contention. The proof is to the contrary.

The objections of the putative father are dismissed on the evidence. The stepfather adoption shall proceed according to law.

Settle decree.

/s/ NATHAN R. SOBEL
Surrogate

Dated: August 3, 1976.

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File No. 200007

IN THE MATTER OF THE ADOPTION OF
A minor under the age of fourteen years by
KAZIM MOHAMMED and MARIA MOHAMMED, his wife

ORDER—September 10, 1976

The petition of Kazim Mohammed and Maria Mohammed, his wife duly verified the 13th day of January, 1976 for an order approving the adoption of David Andrew, a minor under the age of fourteen years and directing that the said minor child shall thereafter and henceforth be treated and regarded in all respects as the child of the petitioners to be known and called by the name of David Andrew Mohammed and a citation having thereupon issued on February 4, 1976 and duly served upon Abdiel Caban and the said Abdiel Caban having appeared, by Danzig, Bunks & Silk Abe Bunks, Esq. of counsel on February 26, 1976 the return date for the citation and opposing and having thereafter served an answer verified the 4th day of March 1976 and an affidavit duly sworn to by the said Abdiel Caban on the 4th day of March 1976 objecting to the proposed adoption of David Andrew, a minor child under the age of fourteen years, by the petitioners Kazim Mohammed and Maria Mohammed, his wife and natural mother of the said child, and the said matter having regularly come on to be heard before Renee Roth, Esq., a Law Assistant to the Surrogate of Kings County on the 22nd day of March, 1976 and the 30th day of April, 1976 and the petitioners Kazim Mohammed and Maria Mohammed having appeared in person and by Morris Schulslaper, Esq., their attorney in support of the petition, and Abdiel Caban in person and

by Abe Bunks, Esq., his attorney having appeared in opposition thereto and David Andrew, a minor under the age of fourteen years having been produced before the court and the said parties having been examined and a hearing having been had and testimony having been taken with respect to the issues herein involved and more particularly with respect to the alleged abandonment of David Andrew, a minor under the age of fourteen years, by Maria Mohammed, his natural mother and after hearing the petitioners, Kazim Mohammed, Maria Mohammed and their attorney, Morris Schulslaper, Esq., in support of the petition and after hearing Abdiel Caban and Abe Bunks, Esq., his attorney, in opposition to the petition and an investigation having been duly ordered to verify the truth of the allegation set forth in the petition, the instrument or agreement of adoption and other papers in the proceeding and such other facts relating to the said infant, David Andrew and to the adoptive parent as would give me full knowledge as to the desirability of approving the said adoption and the investigator having reported that the facts and conditions as set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding are true and are fully stated, and further that in her opinion the adoption of said minor, David Andrew, as prayed for in the petition would be in the best interests of said minor; and due deliberation having been had and a decision of this court having been rendered and filed with this court on August 3, 1976;

IT appearing to my satisfaction that the moral and temporal interests of David Andrew, an infant under the age of fourteen years will be promoted by granting the petition of the said Kazim Mohammed and Maria Mohammed, his wife and approving the proposed adoption; and it appearing to my satisfaction that there is no reasonable objection to the change of name proposed,

NOW, on motion of Morris Schulslaper, Esq., attorney for the petitioners;

ORDERED, ADJUDGED and DECREED, that the contention that the natural mother, Maria Mohammed abandoned the child David Andrew bearing not a scintilla

of evidence to support such contention, and the proof being to the contrary, be and now is, dismissed, and it is further;

ORDERED, ADJUDGED and DECREED, that Abdiel Caban having been accorded a full hearing, his objection to the proposed adoption of David Andrew, an infant under the age of fourteen years, by Kazim Mohammed and Maria Mohammed, his wife and the natural mother of the minor child be, and on the evidence, is now dismissed, and it is further;

ORDERED, ADJUDGED and DECREED, that the petition of Kazim Mohammed and Maria Mohammed, his wife for the adoption of said minor, David Andrew born on the 16th day of July 1969 in New York, New York be and the same is hereby granted and that such adoption and the agreement therefore submitted upon this application be and the same is hereby in all respects approved and it is;

Further Ordered, that the minor, David Andrew shall be henceforth regarded and treated in all respects as the child of the said Kazim Mohammed and Maria Mohammed, his wife and be known and called by the name David Andrew Mohammed.

/s/ Nathan R. Sobel
NATHAN R. SOBEL
Surrogate

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File No. 200006

IN THE MATTER OF THE ADOPTION OF
DENISE CABAN
A minor under the age of fourteen years by
KAZIM MOHAMMED and MARIA MOHAMMED, his wife

ORDER—September 10, 1976

The petition of Kazim Mohammed and Maria Mohammed, his wife duly verified the 13th day of January, 1976 for an order approving the adoption of Denise, a minor under the age of fourteen years and directing that the said minor child shall thereafter and henceforth be treated and regarded in all respects as the child of the petitioners to be known and called by the name of Denise Mohammed and a citation having thereupon issued on February 4, 1976 and duly served upon Abdiel Caban and the said Abdiel Caban having appeared, by Danzig, Bunks & Silk Abe Bunks, Esq., of counsel on February 26, 1976 the return date for the citation and opposing and having thereafter served an answer verified the 4th day of March 1976 and an affidavit duly sworn to by the said Abdiel Caban on the 4th day of March 1976 objecting to the proposed adoption of David Andrew, a minor child under the age of fourteen years, by the petitioners Kazim Mohammed and Maria Mohammed, his wife and natural mother of the said child, and the said matter having regularly come on to be heard before Renee Roth, Esq., a Law Assistant to the Surrogate of Kings County on the 22nd day of March, 1976 and the 30th day of April, 1976 and the petitioners Kazim Mohammed and Maria Mohammed having appeared in person and by Morris Schulslaper, Esq., their attorney in support of the petition, and Abdiel

Caban in person and by Abe Bunks, Esq., his attorney having appeared in opposition thereto and Denise, a minor under the age of fourteen years having been produced before the court and the said parties having been examined and a hearing having been had and testimony having been taken with respect to the issues herein involved and more particularly with respect to the alleged abandonment of Denise, a minor under the age of fourteen years, by Maria Mohammed, her natural mother and after hearing the petitioners, Kazim Mohammed, Maria Mohammed and their attorney, Morris Schulslaper Esq., in support of the petition and after hearing Abdiel Caban and Abe Bunks, Esq., his attorney, in opposition to the petition and an investigation having been duly ordered to verify the truth ordered to verify the truth of the allegation set forth in the petition, the instrument or agreement or agreement of adoption and other papers in the proceeding and such other facts relating to the said infant, Denise and to the adoptive parent as would give me full knowledge as to the desirability of approving the said adoption and the investigator having reported that the facts and conditions as set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding are true and are fully stated, and further that in her opinion the adoption of said minor, Denise, as prayed for in the petition would be in the best interests of said minor; and due deliberation having been had and a decision of this court having been rendered and filed with this court on August 3, 1976;

IT appearing to my satisfaction that the moral and temporal interests of Denise, an infant under the age of fourteen years will be promoted by granting the petition of the said Kazim Mohammed and Maria Mohammed, his wife and approving the proposed adoption; and it appearing to my satisfaction that there is no reasonable objection to the change of name proposed,

NOW, on motion of Morris Schulslaper, Esq., attorney for the petitioners;

ORDERED, ADJUDGED and DECREED, that the contention that the natural mother, Maria Mohammed

abandoned the child Denise bearing not a scintilla of evidence to support such contention and the proof being to the contrary, be and now is, dismissed, and it is further;

ORDERED, ADJUDGED and DECREED, that Abdiel Caban having been accorded a full hearing, his objection to the proposed adoption of Denise, an infant under the age of fourteen years, by Kazim Mohammed and Maria Mohammed, his wife and the natural mother of the minor child be, and on the evidence, is now dismissed, and it is further;

ORDERED, ADJUDGED and DECREED, that the petition of Kazim Mohammed and Maria Mohammed, his wife for the adoption of said minor, Denise born on the 12th day of March 1971 in Brooklyn, New York be and the same is hereby granted and that such adoption and the agreement therefore submitted upon this application be and the same is hereby in all respects approved and it is;

Further Ordered, that the minor, Denise shall be henceforth regarded and treated in all respects as the child of the said Kazim Mohammed and Maria Mohammed, his wife and be known and called by the name Denise Mohammed.

/s/ Nathan R. Sobel
NATHAN R. SOBEL
Surrogate

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File No. 20007 1976

IN THE MATTER OF THE ADOPTION OF
DAVID ANDREW CABAN
a minor under the age of fourteen years by
KAZIM MOHAMMED and MARIA MOHAMMED, his wife

ORDER APPROVING ADOPTION—September 10, 1976

On the petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, adults, duly verified the 13th day of January 1976, and duly reverified before me the day of Sep. 10, 1976, and the affidavits of MORRIS SCHULSLAPER, ESQ. duly sworn to before me the day of Sep. 10, 1976, and the above named parties having severally appeared before me together with DAVID ANDREW CABAN, a minor under the age of fourteen years, and said parties constituting all the parties required to appear before me pursuant to the provisions of an Act relating to the domestic relations, constituting chapter fourteen of the Consolidated Laws, as amended, and said parties having been examined by me, as required by said law, and said parties having presented to me an instrument containing substantially the consents required by said law, an agreement on the part of the adoptive parents to adopt and treat the minor as their own lawful child, and a statement of the date and place of birth of the person to be adopted, as nearly as the same can be ascertained, the religious faith of the parents and of the child, the manner in which the adoptive parents obtained the child, and said instrument having been duly signed, verified and acknowledged as required by law by each person whose consent is necessary to the adoption.

And Narcissus Frett, having been specifically designated by me to make an investigation to verify the truth of

the allegations set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding and such other facts relating to the said infant DAVID ANDREW CABAN and to the adoptive parents as would give me full knowledge as to the desirability of approving said adoption, and the said investigator, Narcissus Frett, having made her report in writing dated 5/28, 1976 and the same having been filed in this Court; and said investigator having reported that the facts and conditions as set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding are true and are fairly stated, and further reporting that in her opinion the adoption of said minor DAVID ANDREW CABAN, as prayed for in the petition herein would be for the best interests of said minor;

And it appearing to my satisfaction that the moral and temporal interests of the said minor DAVID ANDREW CABAN will be promoted by granting the petition of said KAZIM MOHAMMED and MARIA MOHAMMED, his wife, and approving the proposed adoption; and it appearing to my satisfaction that there is no reasonable objection to the change of name proposed, DAVID ANDREW MOHAMMED

NOW, ON MOTION OF MORRIS SCHULSLAPER, ESQ. Attorney for the petitioners herein, it is

ORDERED, that the petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, for the adoption of said minor born on the 16th day of July, 1969 in New York, New York be and the same hereby is granted and that such adoption and the agreement therefor submitted upon this application be and the same hereby are in all respects approved and it is

FURTHER ORDERED, that the minor, DAVID ANDREW CABAN, shall be henceforth regarded and treated in all respects as the child of said KAZIM MOHAMMED and MARIA MOHAMMED his wife, and be known and called by the name of DAVID ANDREW MOHAMMED.

/s/ NATHAN R. SOBEL
Surrogate

IN THE SURROGATE'S COURT
KINGS COUNTY, NEW YORK

File No. 20006 1976

IN THE MATTER OF THE ADOPTION OF
DENISE CABAN
a minor under the age of fourteen years by
KAZIM MOHAMMED and MARIA MOHAMMED, his wife

ORDER APPROVING ADOPTION—September 10, 1976

On the petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, adults, duly verified the 13th day of January, 1976, and duly reverified before me the day of Sep. 10, 1976, and the affidavits of MORRIS SCHULSLAPER, ESQ. duly sworn to before me the day of Sep. 10, 1976, and the above named parties having severally appeared before me together with DENISE CABAN, a minor under the age of fourteen years, and said parties constituting all the parties required to appear before me pursuant to the provisions of an Act relating to the domestic relations, constituting chapter fourteen of the Consolidated Laws, as amended, and said parties having been examined by me, as required by said law, an agreement on the part of the adoptive parents to adopt and treat the minor as their own lawful child, and a statement of the date and place of birth of the person to be adopted, as nearly as the same can be ascertained, the religious faith of the parents and of the child, the manner in which the adoptive parents obtained the child, and said instrument having been duly signed, verified and acknowledged as required by law by each person whose consent is necessary to the adoption.

And Narcissus Frett, having been specifically designated by me to make an investigation to verify the truth of the allegations set forth in the petition, the instrument

or agreement of adoption and other papers in this proceeding and such other facts relating to the said infant DENISE CABAN and to the adoptive parents as would give me full knowledge as to the desirability of approving said adoption, and the said investigator, Narcissus Frett, having made her report in writing dated 5/28, 1976 and the same having been filed in this Court; and said investigator having reported that the facts and conditions as set forth in the petition, the instrument or agreement of adoption and other papers in this proceeding are true and are fairly stated, and further reporting that in her opinion the adoption of said minor DENISE CABAN, as prayed for in the petition herein would be for the best interests of said minor;

And it appearing to my satisfaction that the moral and temporal interests of the minor DENISE CABAN will be promoted by granting the petition of said KAZIM MOHAMMED and MARIA MOHAMMED, his wife, and approving the proposed adoption; and it appearing to my satisfaction that there is no reasonable objection to the change of name proposed,

NOW, ON MOTION OF MORRIS SCHULSLAPER, ESQ. Attorney for the petitioners herein, it is

ORDERED, that the petition of KAZIM MOHAMMED and MARIA MOHAMMED, his wife, for the adoption of said minor born on the 12th day of March, 1971 in Brooklyn, New York be and the same hereby is granted and that such adoption and the agreement therefor submitted upon this application be and the same hereby are in all respects approved and it is

FURTHER ORDERED, that the minor, DENISE CABAN, shall be henceforth regarded and treated in all respects as the child of said KAZIM MOHAMMED and MARIA MOHAMMED, his wife, and be known and called by the name of DENISE MOHAMMED.

/s/ NATHAN R. SOBEL
Surrogate

IN THE SUPREME COURT
OF THE STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

—— A D 2d ——

A—February 1, 1977

181 E
181 AE
182 E
182 AE

IN THE MATTER OF DAVID ANDREW C. (ANONYMOUS).

KAZIM M. (ANONYMOUS) ET AL., RESPONDENTS; ABDIEL C. (ANONYMOUS), APPELLANT.

IN THE MATTER OF DENISE C. (ANONYMOUS).

KAZIM M. (ANONYMOUS) ET AL., RESPONDENTS; ABDIEL C. (ANONYMOUS), APPELLANT.

Danzig, Bunks & Silk, New York, N.Y. (Robert H. Silk and Abe Bunks of counsel), for appellant.

Morris Schulslaper, Brooklyn, N.Y., for respondents.

MEMORANDUM OPINION—Filed February 22, 1977

In two adoption proceedings, the putative father of the children appeals from four orders of the Surrogate's Court, Kings County, all dated September 10, 1976, and made after a hearing, two of which, *inter alia*, dismissed his objections to the respective adoptions and two of which approved the respective adoptions.

Orders affirmed, with one bill of costs to respondents.

Appellant contends that section 111 of the Domestic Relations Law is unconstitutional insofar as it denies to the putative father of a child born out of wedlock the same rights as to the approval of a proposed adoption as are enjoyed by the child's mother and by the father of a child

born in wedlock. That very claim was found to be without merit in *Matter of Malpica-Orsini* (36 NY2d 568, app. dsmd. *sub nom. Orsini* v *Blasi*, 423 US 1042).

RABIN, Acting P.J., SHAPIRO, TITONE and O'CONNOR, JJ., concur.

February 22, 1977

IN RE C., DAVID and DENISE	181 E
(ANONYMOUS), M., KAZIM (ANONYMOUS);	181 AE
C., ABDIEL (ANONYMOUS).	182 E
	182 AE

IN THE SUPREME COURT
OF THE STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

HON. SAMUEL RABIN, Acting Presiding Justice
HON. J. IRWIN SHAPIRO,
HON. VITO J. TITONE,
HON. FRANK D. O'CONNOR,
Associate Justices

IN THE MATTER OF DAVID ANDREW C. (ANONYMOUS).

KAZIM M. (ANONYMOUS) ET AL., RESPONDENTS;

ABDIEL C. (ANONYMOUS), APPELLANT.

IN THE MATTER OF DENISE C. (ANONYMOUS).

KAZIM M. (ANONYMOUS) ET AL., RESPONDENTS;

ABDIEL C. (ANONYMOUS), APPELLANT.

ORDER ON APPEALS FROM ORDERS—
February 22, 1977

In the above entitled causes, the above named Abdiel C. (anonymous), putative father and respondent in the court below, having appealed to this court from four orders of the Surrogate's Court, Kings County, all dated September 10, 1976, and made after a hearing, two of which, *inter alia*, dismissed his objections to the respective adoptions and two of which approved the respective adoptions; and the said appeals having been argued by Robert H. Silk, Esq., of counsel for the appellant and argued by Morris Schulslaper, Esq., of counsel for the respondents, due deliberation having been had thereon;

and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the orders appealed from are hereby unanimously affirmed, with one bill of costs to respondents.

Enter:

/s/ IRVING N. SELKIN
Clerk of the Appellate Division

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

IN THE MATTER OF THE ADOPTION OF DAVID A. C. (ANONYMOUS).
KAZIM M. ET AL., RESPONDENTS;
ABDIEL C., APPELLANT.

IN THE MATTER OF THE ADOPTION OF DENISE C. (ANONYMOUS).
KAZIM M. ET AL., RESPONDENTS;
ABDIEL C., APPELLANT.

Argued October 13, 1977; decided November 17, 1977

MEMORANDUM

Appeal dismissed, with costs. The purportedly direct and dispositive constitutional issues underlying this appeal are no more than a restatement of questions whose merit has been clearly resolved against appellant's position (*Matter of Malpica-Orsini*, 36 NY2d 568, app dsmd *sub nom. Orsini* v *Blasi*, 423 US 1042), and must be held to lack the degree of substantiality necessary to sustain this appeal as of right under CPLR 5601 (subd [b], par 1) (*Tabankin* v *Codd*, 40 NY2d 893; *People ex rel. Uviller* v *Luger*, 38 NY2d 854; see NY Const, art VI, § 3, subd b). Accordingly, it must be dismissed (Cohen and Karger, Powers of the New York Court of Appeals, § 55, p. 254).

Chief Judge BREITEL and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur in memorandum.

Appeal dismissed.

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

The Hon. Charles D. Breitel, Chief Judge, Presiding

2 No. 561

IN THE MATTER OF DAVID ANDREW C. (ANONYMOUS).

KAZIM (ANONYMOUS) &ano., RESPONDENTS.

ABDIEL C. (ANONYMOUS), APPELLANT.

IN THE MATTER OF DENISE C. (ANONYMOUS).

KAZIM (ANONYMOUS) &ano., RESPONDENTS.

ABDIEL C. (ANONYMOUS), APPELLANT.

The appellant(s) in the above entitled appeal appeared by Danzig, Bunks & Silk; the respondent(s) appeared by Morris Schulslaper.

JUDGMENT AND REMITTITUR—
Filed November 17, 1977

The Court, after due deliberation, orders and adjudges that the appeal is dismissed, with costs, in a memorandum.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Surrogate's Court, Kings County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ Joseph W. Bellacosa
JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office, Albany,
November 17, 1977.

IN THE COURT OF APPEALS
STATE OF NEW YORK

Present, Hon. Charles D. Breitel, Chief Judge, Presiding.

Mo. No. 1148

IN THE MATTER OF THE ADOPTION OF
DAVID ANDREW C. (ANONYMOUS), a Minor &c., by
KAZIM (ANONYMOUS) ET AL., RESPONDENTS,
ABDIEL C. (ANONYMOUS), APPELLANT.

IN THE MATTER OF THE ADOPTION OF
DENISE C. (ANONYMOUS), a Minor &c., by
KAZIM (ANONYMOUS) ET AL., RESPONDENTS,
ABDIEL C. (ANONYMOUS), APPELLANT.

ORDER DENYING MOTION FOR REARGUMENT—
January 10, 1978

A motion for reargument in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Joseph W. Bellacosa
JOSEPH W. BELLACOSA
Clerk of the Court

IN THE COURT OF APPEALS
STATE OF NEW YORK

Present, Hon. Charles D. Breitel, Chief Judge, Presiding.

Mo. No. 111

IN THE MATTER OF THE ADOPTION OF
DAVID ANDREW C. (ANONYMOUS), a Minor &c., by
KAZIM (ANONYMOUS) ET AL., RESPONDENTS,
ABDIEL C. (ANONYMOUS), APPELLANT.

IN THE MATTER OF THE ADOPTION OF
DENISE C. (ANONYMOUS), a Minor &c., by
KAZIM (ANONYMOUS) ET AL., RESPONDENTS,
ABDIEL C. (ANONYMOUS), APPELLANT.

ORDER DENYING MOTION FOR REARGUMENT—
February 14, 1978

A motion for reargument in the above cause having heretofore been made upon the part of the appellant and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Joseph W. Bellacosa
JOSEPH W. BELLACOSA
Clerk of the Court

SUPREME COURT OF THE UNITED STATES

No. 77-6431

ABDIEL CABAN, APPELLANT

v.

KAZIM MOHAMMED and MARIA MOHAMMED

ON CONSIDERATION of the motion of appellant for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

May 15, 1978

SUPREME COURT OF THE UNITED STATES

No. 77-6431

ABDIEL CABAN, APPELLANT

v.

KAZIM MOHAMMED and MARIA MOHAMMED

APPEAL from the Court of Appeals of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

May 15, 1978

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 266618 38

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-6431

- - - - - - - - - - - - - - - -

ABDIEL CABAN,

Appellant

-against-

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

- - - - - - - - - - - - - - - -

ON APPEAL TO THE COURT OF APPEALS OF THE

STATE OF NEW YORK

- - - - - - - - - - - - - - - -

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
SS.:
COUNTY OF KINGS)

Myrna D. Berger, being duly sworn, deposes and says:

Deponent is not a party to the action, is over the age of 18 years and resides in Kings County.

On April 15th, 1978, deponent served a copy of the foregoing Motion to Dismiss and to Affirm upon Robert H. Silk, Attorney for Appellant, at 401 Broadway, Suite 1701, New York, New York 10013, by depositing a true copy of same enclosed in a first class postage prepaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Myrna D. Berger
Myrna D. Berger

Sworn to before me, this
15th day of April, 1978.

MORRIS SCHULSLAPER
Notary Public, State of New York
No. 24-
Qualified in Kings County
Commission Expires March 30, 1980

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CASES CITED

STATUTES CITED

In The

SUPREME COURT OF THE UNITED STATES

No. 77-6431

- - - - - - - - - - - - - - - - -

ABDIEL CABAN,

Appellant

-against-

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

- - - - - - - - - - - - - - - - -

ON APPEAL TO THE COURT OF APPEALS OF THE

STATE OF NEW YORK

- - - - - - - - - - - - - - - - -

MOTION TO DISMISS

The appellees, Kazim Mohammed and Maria Mohammed, residents of the Borough of Brooklyn, City and State of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States move to dismiss the appeal from the judgment of the Court of Appeals of the State of New York upon the ground that it does not present a substantial federal question; and is not within the jurisdiction of the court; and that the federal question sought to be reviewed was expressly passed upon; and that the judgment rests upon an adequate non-federal basis.

MOTION TO AFFIRM JUDGMENT

The appellees, Kazim Mohammed and Maria Mohammed,

residents of the Borough of Brooklyn, City and State of New York, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States move the court to affirm the judgment of the Court of Appeals of the State of New York sought to be reviewed on the ground that the State of New York was not required to find anything more than that the adoption(s) was in the best interests of the child(ren) and that the appellant's interests were readily distinguishable from those of a divorced father; and that the State was not foreclosed from recognizing this difference in the extent of its committment to the welfare of the child(ren); that the State could permissively give appellant less veto authority than it provides to a married father; that the appellant, who, assisted by counsel, was accorded a full, exhaustive hearing bearing on proofs relative to the best interests of the child(ren) was not, in this case, deprived of his asserted rights under the Due Process and Equal Protection Clauses.

Quilloin v. Walcott
98 S. Ct. 549

OPINIONS

The opinion of the Court of Appeals of the State of New York was reported in Matter of David A. C. 43 NY^{2nd} 708; 401 NYS^{2nd} 208(1977). The Court unanimously affirmed the opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department reported as Matter of David Andrew C. in 56 A. D.^{2nd} 627; 391 NYS^{2nd} 846

which unanimously affirmed the orders of the Honorable Nathan R. Sobel, then Surrogate of the County of Kings, State of New York dismissing the appellants objections and approving the adoptions.

The opinion of the Surrogate of Kings County, State of New York was not reported.

The opinions of the Court of Appeals, the Supreme Court of the State of New York, Appellate Division of the Second Judicial Department and of the Surrogate of Kings County, State of New York, appear as appendix's A, B and C to the appellant's jurisdictional statement.

The appellant, by notice of motion for reargument directed the attention of the Court of Appeals to Quilloin v. Walcott, (supra) then pending before this court. The motion for reargument, upon the papers submitted, was denied by order dated January 10th, 1978.

Quilloin v. Walcott et vir (supra) was decided by this court on January 10th, 1978.

The appellant sought reargument for a second time, presumably in the belief that the Court of Appeals was not aware of the Quilloin cause or this Court's decision when it denied the appellant's motion to reargue, on January 10th, 1978.

The appellant's second motion to reargue was denied by order dated February 14th, 1978.

Appellants Appendix's E/F

JURISDICTION

Appellant invokes the jurisdiction of the Court pursuant to 28 U.S.C. Section 1257 (2).

STATUTE INVOLVED

Domestic Relations Law of the State of New York, Section 111, subdivision 3 thereof, now by revision effective January 1st, 1977, denominated subparagraph (c) thereof.

THE QUESTION

The appellant proposes the question:

Whether Section 111, subdivision 3 (now subdivision c) of the Domestic Relations Law of the State of New York as passed upon by the Courts of the State of New York is contrary to the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF FACT

The record on appeal to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department and the Court of Appeals of the State of New York from the opinion and the order(s) of the Surrogate of Kings County which dismissed the appellant's objections after hearing on the evidence and, in the best interests of the child(ren), allowed Kazim Mohammed to adopt David Andrew and Denise established that:

Maria Mohammed was eighteen years old when in 1968, she entered an out-of-wedlock relationship with Abdiel Caban, then matured at thirty-one years of age, married but separated from his lawful wife for more than eight years, the father of two children, now on information and belief, twenty-two and 18 years old.

Maria Mohammed gave birth to David Andrew on July 16th, 1969 and Denise on March 12th, 1971.

The appellant did not offer nor did he pay the costs and expenses attendant to either birth. He did not formally acknowledge that he was the father of either child; there is no Family Court or other order of filiation.

The mother, for birth certificate purposes, named him the father of David Andrew; only after some months and at the insistence of Maria Mohammed did the appellant allow himself to be named Denise's father.

Throughout their liason, and except for three months after Denise's birth, Mrs. Mohammed was fully employed, paid all household expenses, purchased all clothing and equipment necessary to the children including even the child's crib/bed. After the three months Mrs. Mohammed returned to work; a local family care center without cost to Mr. Caban provided a babysitter so that she could continue employment.

Mr. Caban allowed himself to purchase $30.00 worth of food a week for the four persons. For six months immediately prior to the time Mrs. Mohammed left him, he purchased no food, made no financial contribution; he drank "too much";

he beat Mrs. Mohammed; he called her names (bitch/fuck); he "borrowed" money from Mrs. Mohammed never to return it; throughout this relationship, although she asked, he never gave her any money.

Maria Mohammed testified that she felt trapped; she had nowhere to go until she met Kazim Mohammed who was made aware of her relationship with Caban and her two children. She and the children lived with Mohammed as of December, 1973.

The Mohammed's married on January 30th, 1974 and from such marriage a third child, Stephan Kazim Mohammed, was born to them on December 17th, 1975. For fear of Abdiel Caban, she kept her marriage secret.

Mr. Caban admitted that in June or July or "late in 1974", Mrs. Mohammed advised him that the children David Andrew and Denise were with her mother in Puerto Rico. He did not protest their absence; he did not demand their return; he never wrote to the maternal grandmother or inquire of her as to the children; he made no efforts to ensure such rights to the children as he protested before the nisi prius court or on appeal; he did not send any money for their benefit.

Sometime in September or October of 1975, the appellant stated, he consulted local counsel. He then journeyed to Puerto Rico.

In November of 1975 Mr. Caban forcibly, under guise of concern and/or by trick and device snatched the children from their Puerto Rican home with the maternal grandmother, kept them secreted from Maria Mohammed and even resisted police inquiries and efforts until January 16th, 1976 when their mother appealed to and a Family Court returned them to her.

Except for the time of his wilful act Maria Mohammed had full custody, financially provided for and assured the children's health and welfare.

Not before the Family Court of the City of New York, the Surrogates Court of Kings County or on appeal to the courts of the State of New York did Mr. Caban denounce the mother as unfit for custody of her children. Nor does he now do so.

The nisi prius Court found Caban's accusation that Maria Mohammed abandoned her children by permitting them to accompany their maternal grandmother to Puerto Rico groundless, without a scintilla of evidence. And, as to the appellant's expressed concern for the welfare of the children whereby he removed them from their lawful custody, the original Court not only found Mr. Caban's testimony belied, it challenged Mr. Caban's motives as harassment.

Appellants Appendix (c)

It is to be noted that throughout his relationship with Maria Mohammed Mr. Caban remained married to another woman whom he, by his testimony, had left or abandoned, certainly from whom he had been separated for more than eight (8) years.

Neither the birth of the child David Andrew or Denise inspired him to seek divorce and marry the mother

of the children. Caban did not, on hearing, pretend that he wished to do so. He neither purchased engagement or wedding ring; he did not pay the costs of maternity confinement, he left such expenses for Maria to provide.

Only after Maria Mohammed left him for the security of a lawful marriage and a stabilized family unit and then very quickly, in June of 1974 Mr. Caban divorced his first wife. In the course of proceedings he married his current wife, Nina on December 16th, 1975.

Nina Caban had never seen the children until Abdiel Caban, not then her husband, absconded with them from Puerto Rico without official or judicial sanction and produced them for her considered care on November 15th, 1975. She joined Mr. Caban in petition against the appellee and she, as well as her husband, was fully heard by the fact-finding court.

It is to be noted that although the appellant, by his admissions made on the hearing when he was ably assisted by able counsel, was aware that the children were sojourning with their maternal grandmother in Puerto Rico since July, or late in 1974 he did not inquire as to their welfare, health or needs, financial or otherwise; he forwarded no monies for their aid; he neither protested their absence or demanded their return for fourteen=months or more; that in Puerto Rico he did not consult an attorney; appeal to the police; appeal to the Family Court of Puerto Rico for custody of the children or towards a neglect petition; he did not protest to the maternal grandmother; he, by self-appointed authority and singular act, decided that it would be in their best interests to bring them back to New York (and) he did so.

If it were necessary or lawfully essential for the Surrogate to find Mr. Caban to be unfit for custody of the children or to find that he had disclaimed them for fourteen months and abandoned the children, the record of hearing would amply support the finding.

THE ARGUMENT

The appellant resisted the opinion of the Kings County Surrogate dated August 3rd, 1976 whereby his objections as the putative father to the adoptions of the children were dismissed as belied on the evidence and the order(s) dated September 10th, 1976 whereby the appellees were allowed adoption in the childrens best interests; he proposed to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department that, "the orders appealed from were contrary to law and violative of the appellant's constitutional rights."

The appellees submitted that in light of Matter of Malpica - Orsini, 36 NY2nd 568, decided by the Court of Appeals on May 8th, 1975, App. dsmd. sub. nom. Orsini v. Blasi, 423 U.S. 1042; 96 S. Ct. 765, the question before the court was "whether the facts in the proceedings at Bar are distinguishable from those set forth in the Matter of Malpica - Orsini?"

Matter of Sean B. W
86 Misc 2nd 217

The appellant resists the Court of Appeals finding that his cause lacked constitutional substantiality, he then and now, unilaterally, rules out Malpica - Orsini declaring, although without reference to all the facts that the "Orsini"

record included a stipulation in lieu of a testimonial transcript and did not include a subsisting relationship beyond that Orsini was adjudicated to be the father of the child, Heather; that he had never lived with the child; had or sought custody or that he ever took care of the child.

In fact Hector Orsini averred to the Family Court of Westchester County that he resided with the child and its mother until two years after its birth; that the mother, in the course of a paternity proceeding, declared him to be the child's father; that he had never denied paternity or attempted to minimize his rewponsibilities and obligations toward the child; that, with his acknowledgment and consent an order of filiation had been duly entered; that he had purchased and given the child's mother an engagement and wedding ring which the latter still had; that he had proposed marriage to the mother of his child; that he paid all of Heather's expenses including doctor bills, medical bills and all other expenses inherent in properly raising a healthy baby; that he paid the rent and gave the mother 80% of his net take-home pay so that Heather, the child could be well-cared for.

Hector Orsini prayed that his objectives to the adoption of his child by a "stranger" be given the same force and effect as would the objections of any other father and - - the petition for adoption be dismissed.

Affidavit of Hector Orsini
Dated: July/1973
App. Brief - Vol. 12055 Case 3
Supreme Court Library of
Brooklyn

The appellant nevertheless contends that there is a difference between the Matter of Malpica - Orsini and his cause at Bar k which renders the unanimous opinions the New York State Courts constitutionally infirm; that the difference lies in the "sketchiness of the father's relationship to his child in "Malpica - Orsini" and the strongly knit ties between father and children here".

Appellant's Jurisdictional
Statement at p. 16

Mr. Caban finds, he believes, irrefutable substance in the fact that the facts, stipulated and therefore accepted as if fully heard by the court, fleshed out "no real bonds at all between Hector Orsini and the child, Heather."

The stipulation between the Malpica - Orsini parties was made, research discloses before the Honorable Vincent Gurahiam, FCJ; Westchester County, New York on December 18th, 1973 and among other provided, as Mr. Caban similarly contends that:

5) Mr. Orsini opposes the adoption of his child by her (Corinne Cabert. Blasi) husband; and has never signed any consent to such adoption;

6) The objectant, Hector Orsini, has not consented to the adoption nor has he abandoned the child nor waved any substantive rights he may have pursuant to Statute;

7) It is stipulated and agreed that if the parties were called to testify that the court

would have sufficient facts before it, other than abandonment or other waiver of rights by Mr. Orsini, to exercise its discretion to deny his objections and approve the adoption on the grounds that the overall best interests of the child would warrant it;

8) There are no factual grounds to justify a finding that Mr. Orsini abandoned or neglected his child;

Record on Appeal
Malpica - Orsini
(Supra)
Appellee's Appendix A

Abdiel Caban did not fare as well before the hearing court nor did the record on appeal demonstrate such committment to the children David Andrew and Denise as would allow the New York State Courts, nisi prius or Appellate, to except his cause from the principle enumerated by Malpica - Orsini (supra) or this court to allow review.

Nevertheless, the appellant urges review of his record on the ground that "it is apparent that the father there (Hector Orsini) did not have at stake such a substantial interest as to warrant this Court's jurisdiction to review the constitutionality of the statute. Thus, Section 111 was not ripe for review in that case. It is now."

Appellant's Jurisdictional
Statement at p. 17

The appellant concludes, it appears, that upon the facts at Bar as he translates such, Section 111 (3)

of the Domestic Relations Law was improperly applied and, if not as to other putative fathers certainly unconstitutional as to his best interests under the authority of Quilloin v. Walcott, (98 S. Ct. 549; 54 L. Ed.2nd 511, decided January 10th, 1978.)

The appellant, (as did Quilloin) insisted before the New York State County, original and appellate that he was entitled as a matter of due process and equal protection to an absolute veto unless he was formally adjudicated as unfit for parenthood.

The appellant does not (as Quilloin did not) protest the hearing which was afforded him on March 19th, March 20th and April 30th, 1976. He had the right to present affirmative evidence that the adoptions were not in the children's best interests; he was allowed the right to offer other alternatives including, as he did, his right to adopt them; he did not challenge nor offer any evidence that Maria Mohammed, their mother was unfit for custody; he neither alleged nor offered evidence that Kazim Mohammed was ill-suited or unfit as an adoptive father; he was well-represented by counsel; his proofs and contentions, including his insistences that he had the absolute right of veto absent proof of his unfitness to continue as a putative father were accorded respectful consideration.

The adoptions were allowed, in the children's best interests, after Abdiel Caban and his witnesses, including his new wife, Nina, were fully heard.

Quilloin protested the laws of Georgia (Ga. Code Ann. Section 74-403 (3) (1973) which required only the consent of the mother of an illegitimate child for adoption; and Caban protests the constitutional viability of an identical statute on the authority of Stanley v. Illinois (405 U.S. 645 (1972) in which matter Stanley was protected against the arbitrary act of the State of Illinois not against the fit, functional surviving mother of the children.

The Court held:

> "Stanley left unresolved the degree of protection a State must afford to the rights of an unwed father in a situation, such as that presented here, in which the counter-vailing interests are more substantial".
>
> "Thus, (Mr. Justice Marshall, for a unanimous court, said) the underlying issue is whether, in the circumstances of this case and in light of the authority granted by Georgia (and New York) law to married fathers, appellants interests were adequately protected by a "best interests of the child" standard."

Quilloin v. Walcott
Supra - pages 2 and 8

In neither case, Quilloin or Caban at Bar was the mother of an illegitimate child seeking a normal home, name and full family relationship for her child and therefore, consenting to its adoption by her lawful husband, required to obtain the consent of the putative father or alternatively prove that the putative father was unfit or had abandoned the child/children for in such case, Mr. Justice Cooke, of the Court of Appeals (Matter of Malpica-Orsini - supra) said:

> "- - the chances that such a child will have the equal rights and benefits of a name will be unmeasurably diminished and the likelihood that he or she will be a pawn for the avaricious and embittered will be greatly enhanced."

Similarly, this court found that the majority of the Georgia Court relied on a permissible strong State policy of rearing children in a family setting, "policy which in the court's view might be thwarted if unwed fathers were required to consent to adoptions" and therefore that the appellants interests are readily distinguishable from those of a divorced fathers'; that the State could permissively give a putative father less veto authority than it provides to a married father and finally, that the State of Georgia was not required, in that situation, to find anything more than that the adoption was in the best interests of the child; that by use of such standard, the child's welfare, the appellant (Quilloin) was not deprived of his substantive rights under the Due Process and Equal Protection Clauses of the Constitution.

Quilloin v. Walcott
Supra

The appellant now contends that he is to be protected under the dicta of the case that is:

> "we have little doubt that the Due Process Clause would be offended "(i)f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interests."
> Smith v. Organization of Foster Families for Equality and Reform - - U.S. - - (1977) (Stewart, J. concurring).

"But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child has never lived. Rather, the result of the adoption is to give full recognition to a family unit already in existance, a result desired by all concerned except appellant."

Quilloin v. Walcott
Supra at p. 9.

Malpica - Orsini
36 NY2nd 568, App. dismid
423 U.S. 1042

CONCLUSION

The appellees urge, therefore, that the facts in the proceedings at Bar are not distinquishable from those set forth in Quilloin v. Walcott, (supra); that the appellants substantive rights were not violated by the application of the "best interests of the child" standard; that the appellant was not deprived of his rights under the Due Process and Equal Protection Clauses of the Constitution of the United States.

Dated: April 15th, 1978

Respectfully submitted,
Morris Schulslaper
Morris Schulslaper
Counsel for Appellees
Office and P.O. Address
16 Court Street
Brooklyn, New York 11241

FAMILY COURT
COUNTY OF WESTCHESTER

- - - - - - - - - - - - - - - - - - - -X

In the Matter of the adoption of :
HEATHER ALISON MALPICA-ORSINI, a :
minor under the age of 14 years, :
by CHARLES BLASI, :
:
HECTOR ORSINI, :
: AFFIDAVIT IN SUPPORT OF MOTION
Petitioner, :
:
-against- :
:
CHARLES BLASI, :
:
Respondent

- - - - - - - - - - - - - - - - - - - -X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

HECTOR ORSINI, being duly sworn, deposes and says:

I am the father of Heather Alison Malpica-Orsini (hereafter "Heather") and submit this affidavit in support of my application to oppose the adoption of my daughter, permitting me to visit my daughter in accordance with the prior order of the Family Court, New York County, and for other relief.

Heather was born on November 16, 1970 at Misericordia Hospital, Bronx, New York. Her name is registered as "Heather Alison Malpica-Orsini" on the birth certificate which states that I am the baby's father.

There is no question as to my being Heather's father. Heather's mother, then known as Corrine Caberti, and I met during February, 1969 and continuously resided together until two years after Heather's birth. Moreover, in her petition commencing a paternity action, sworn to on July 25, 1972, she stated that I was Heather's father. At no time nor in any way have I ever denied paternity, nor did I in any way attempt to deny or minimize my responsibilities and obligations towards

y daughter. I stated that I am Heather's father in open court before Hon. Nanette Dembitz, in the Family Court, New York County, on September 8, 1972. An Order of Filiation and Support was then duly signed and filed adjudging me to be Heather's father.

I at all times strictly complied with the directions of the Order until further compliance was made impossible due to the actions of Heatner's mother in January, 1973, as will be more fully set forth.

Early in 1970, when we realized that we were going to have a child, I proposed that we marry. I gave Corrine a wedding ring and an engagement ring, which she still has. She refused to marry me because she did not like the way I had proposed. I proposed again. However, she made it clear to me that as far as she was concerned the question of our marrying was closed. I sought to change her mind, not only for my sake but for the sake of our unborn child, but she was adamant and persistent in her refusal.

On November 16, 1970, Heather was born. For a period of about two years, until June 1972, when Heather's mother forced me from my apartment, I continuously resided with my daughter. During this time my daughter and I developed the mutual love and affection that only a parent can establish with his child and a child with her parent. I paid for all Heather's expenses, including doctors' bills, medical bills and all the myriad expenses inherent in properly raising a healthy baby. During these two years, Heather, her mother and I existed as a family unit. I raised and cared for Heather at least as well as any other man would care for his child. I believe that Heather's physical and psychological development during this critical period was exemplary.

Since June of 1972, I was compelled to obtain new shelter which put a tremendous strain on my resources. Nevertheless, out of concern for my daughter's welfare, I continued to pay the rent on the apartment. I wanted Heather to be able remain in the physical surroundings she had grown accustomed to, in an effort to minimize the shock and impact upon her of my sudden absence.

Shortly thereafter, on August 10, 1972, Heather's mother instituted a paternity suit in Family Court, New York County, in which she alleged that I was Heather's father. I appeared in that proceeding and admitted my paternity, as I have already stated. An Order of Filiation and Support was signed by Judge Nanette Dembitz on September 8, 1972, to which I have already referred, ordering me to pay child support of $150 per month commencing October 1, 1972, and granting me visitation rights every Sunday.

I did not consider my contributions for my daughter's support and well-being limited by this order. In fact, I sent Heather's mother close to 30% of my net take-home pay to insure that she would have sufficient funds to adequately take care of herself so that she wouldn't have to cut corners on Heather's needs.

I had attempted to visit my daughter every Sunday, but since I was working full-time as a Special Investigator for the New York City Department of Health and attending school at St. Johns University for an M.B.A. degree, I was unable to see her every Sunday. However, I estimate that until my daughter was hidden from me in January, 1973, I was able to see her on the average of every other Sunday. When I did see her, I felt that we both had as meaningful few hours together as possible with an infant of her age. There is nothing so satisfying to a parent and so reassuring to me as the unbridled

joy that lit up her eyes every time she spread her arms and ran towards me. It is important for my child to be together with her father, even if it is only once a week. A surrogate father or a father image is insufficient. A child can have one or more of both, yet can always recognize, especially at this age, the love that only a father can bestow. I am extremely apprehensive of the psychological trauma that will result when a child, at such a tender and yet comprehending age, is denied access to her father whom she has known and loved for practically her entire life. Heather knows me and recognizes me as her father. Her health and welfare require that I continue to give her the love and support that only a father is capable.

I had made several appointments for Corrine and me to meet with a family counselor at Columbia University during September, 1972 through February, 1973. Of the approximately six appointments that we had made, Corrine appeared but once. I endured this emotional turmoil because I was concerned about my daughter's health and welfare. I know Corrine. I lived with her for over three years and I am honestly concerned about the type of upbringing and influence, moral and otherwise, that she will impose upon my daughter. I am also concerned about Heather's emotional reaction to her new and strange environment and the quality of the care and attention she will receive in a house with a strange man.

In early January, 1973, Heather's mother unilaterally abrogated the order of September 8 by returning my support checks, moving to a new address and refusing to allow me to see my daughter. She told me that she would no long allow me to ruin her Sundays. This was so noted by Judge Dembitz in her endorsement to my petition, which states that "respondent returned support payment and refused visitation."

I attempted to resolve this matter between myself and her, but to no avail. I was compelled, therefore, on March 30, 1973 to move in Family Court, New York County, for an order enforcing my visitation rights. During this time, I was extremely apprehensive and concerned for the safety and well-being of my daughter. She was very accustomed to my constant attention, but suddenly she, due to her mother's efforts, saw me only infrequently. And now, to further confuse and upset her, she was moved to a strange residence where a strange man, not her father, resided.

A hearing was held on my motion before Judge Dembitz on April 12, 1973, at which time Heather's mother alleged that she had married Mr. Blasi and that Mr. Blasi wanted to adopt my daughter. I was shocked and dismayed that she would marry a virtual stranger in an attempt to prevent me from seeing my daughter. Corrine is a very demanding person and is accustomed to getting her way, regardless of whether she is right or wrong. Nothing infuriates her more than one not adhering to her every whim. I can only surmise, therefore, that Mr. Blasi either is unaware of her character and habits or is willing to be subservient, dominated and controlled by her. I am convinced, therefore, that this adoption petition was not filed as a result of any true love and affection between Mr. Blasi and my daughter, but rather as a concession to Heather's mother's demands.

Judge Dembitz declined to issue an order enforcing my visitation rights at that time due to the allegation that Mr. Blasi wished to adopt my daughter from me, and stated that my status and role should be considered in the adoption proceedings.

I respectfully submit to this court that my status as Heather's father, my long established concern for my daughter's future health, care and welfare entitle me to be heard in any deliberations concerning her future. As such, I do have standing in this matter and must receive notice and an opportunity

to be heard at any and all proceedings that are to take place. I should further be entitled to object to the adoption and have my objection given the same weight and validity accorded to that of any other father.

I raised and cared for my daughter since she was born. I lived with my daughter from the moment she was born until the time she was wrongfully concealed from me, a period of almost two years, during which time I devoted much time and attention to her health, welfare and upbringing. There is no question that my daughter flourished in my home and in my care. My love for Heather and my concern for her continued health and welfare is of paramount importance to me. I have always been and still am fully prepared to accept my obligations as a father and respectfully submit that I have every right to continue to be responsible for her. My rights and obligations as father of my child should not and cannot be arbitrarily abrogated without my consent and without a showing that her continued association with me would be detrimental to her. I do not wish to terminate or limit my obligations as father. I do not consent to the adoption of my daughter. Mr. Blasi cannot be given rights superior to mine in the health, care and upbringing of my daughter in the face of my objections.

My rights as Heather's father should be no more and no less than those accorded to any other father. A child cannot be adopted without the consent of its parents. My child cannot be adopted without my consent.

I realize that the primary interest of this court is the health and welfare of my child. This is my concern as well. I submit that my daughter is entilted to no better nor worse treatment than any other child in similar circumstances. If Heather's mother and I had married, as I wanted, and separated immediately after her birth, my daughter could not be

adopted without my consent. Am I to be relegated to the status of a nonexisting father, is my paternity to be denied, my rights and obligations as father extinguished, my concern for my daughter's health and welfare overlooked, my knowledge of my daughter's physical and mental needs to be ignored, and my ability and my capability as a proper father deemed irrelevant simply because a marriage certificate had not been filed? Is Heather to be denied the benefit of my concern for her, my knowledge of her needs, and a father's love merely because a marriage certificate had not been filed?

WHEREFORE, I respectfully request that an order be entered:

(1) Enforcing my rights of visitation as set forth in the Order of Filiation made in the Family Court, New York County, on September 8, 1972;

(2) Granting me notice and an opportunity to be heard at all proceedings concerning my daughter;

(3) Giving my objections to the adoption of my daughter the same force and effect that would be given to the objection of any other father;

(4) Dismissing the petition for adoption, and

(5) For such other and further relief as to this court may seem just and equitable.

HECTOR ORSINI

Sworn to before me this
2nd day of July, 1973.

Notary Public

MARVIN SRULOWITZ
NOTARY PUBLIC, State of New York
No. 31-4500915
Qualified in New York County
Commission Expires March 30, 1973

stipulation on the record?

MR. SRULOWITZ: I will, your Honor.

It is hereby stipulated and agreed between the parties that;

(1) Corrine Caberti Blasi is the mother of Heather Alison Malpica-Orsini;

(2) That Mr. Orsini is the adjudicated putative father of Heather Alison;

(3) Mr. Charles Blasi is the proposed adoptive parent and is the lawful husband of the mother of the child;

(4) The mother consents to the adoption of her child by her husband;

(5) Mr. Orsini opposes the adoption of his child and has never signed any consent to such adoption;

(6) The objectant, Hector Orsini, has not consented to the adoption nor has he abandoned the child nor waived any other substantive rights he may have pursuant to statute;

(7) It is stipulated and agreed if the parties were called to testify that the Court would have sufficient facts before it, other than abandonment or other waiver of rights by Mr. Orsini, to exercise

its descretion to deny his objections and approve the adoption on the grounds that the overall best interest of the child would warrant it;

(8) There are no factual grounds to justify a finding that Mr. Orsini abandoned or neglected his child;

(9) If Mr. Orsini's standing to object to the adoption of his child under Domestic Relations Law Section 111, Paragraph 3 is to be treated in the same way as the father in wadlock his objections would be upheld and the adoption disapproved.

Next is the two legal questions, your Honor.

THE COURT: Gentleman, before you got to that, I had suggested for various reasons to go into that and I think we should point out that both parties are cognizant of the fact, regardless of the outcome of this case, no purpose would be served by taking testimony that could some day prove to be of embarrassment either to the parties or to the child and I think that it is in that spirit both of you have agreed to dispense with taking further testimony recognizing, as I said before, that we are really dealing with two legal questions and not factual questions.

Now, I think you wish to state on the record

the legal questions that you anticipate will be submitted to an appellate court based on these proceedings, is that correct.

MR. LOWENTHAL: May I also ask, for the record, that the testimony taken here not be involved in this proceeding?

THE COURT: Yes. You are not going to type up the transcript of the testimony because it is irrelevant.

It will be on an agreed statement of facts.

MR. SRULOWITZ: Now, the next questions.

(1) Is an adjudicated putative father entitled to notice and an opportunity to be heard upon his objections to the adoption of his child;

(2) Is the objection to an adoption, raised by an adjudicated putative father, who has not consented to the adoption nor abandoned his child, sufficient grounds to deny the adoption to the same extent as it would be if he were the in wedlock father.

THE COURT: Those are your two issues because I think it is agreed, although there are various grounds in the statute for overruling the objection of an in wedlock father to an adoption

IN THE

SUPREME COURT OF THE UNITED STATES

No. 77-6431

- -

ABDIEL CABAN,

Appellant,

- against -

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

- -

BRIEF IN OPPOSITION TO MOTION TO
DISMISS OR TO AFFIRM

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Attorney for Appellant

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- - - - - - - - - - - - - - - - - -

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

INTRODUCTION

Appellees do not challenge the underlying facts showing the strong ties between the appellant and his children which is contained in the Jurisdictional Statement. They deftly try to avoid its implications. Their motion to dismiss or affirm is a study in the art of confusion. Its purpose is to avoid confronting the inevitable constitutional issues of Due Process and Equal Protection.

Only "abandonment" by appellant had been alleged by appellees in their adoption petition as the basis for denying him his parental rights. In granting the adoption of appellant's two children, the State had dismembered his family without proof and specific findings of abandonment or unfitness. The courts below ignored his repeated invocation of his constitutional rights.

Their sole rationale was the claimed constitutionality of Section 111. That statute denied him the right to preserve his family solely because he was the (1) unmarried (2) male parent. This, despite the fact that he shared custody, participated in raising and rearing them, had exclusive custody shortly before the adoption petitions and despite the fact that custody litigation with the mother pended undetermined on the merits in another court.

To accomplish their diversionary end, appellees distort the record (a) in the case at bar and (b) the sole case authority on which they rely, Matter of Malpica-Orsini, 36 N.Y.2d 568.

A. DISTORTIONS OF RECORD AT BAR

Appellees' evident purpose here is smokescreen to blur the Fourteenth Amendment violations presented by the appeal. A multitude of peripheral claims made by appellees at the trial, all disputed and none found to exist by the trier of the facts, is raised like a veritable blizzard.

Appellees purport to state facts. Actually, all they do is paraphrase some of their own contradicted trial testimony. Suffice it to say that judicial findings of fact below do not support any of appellees pejorative charges. Indeed, it belies the most serious of them -- that appellant did not support his own children during the period they lived together as a family. (R.20, Appendix C, Jurisdictional Statement):

> "During this entire relationship both the natural mother and the putative father were employed and contributed to the support of the family."

None of the charges made by appellees against appellant, even if backed by judicial findings which they were not, would have justified the destruction of his family. They certainly would not have had that effect had he been the female rather than the male parent, nor if he had been married rather than unmarried.

B. DISTORTION OF RECORD OF MATTER OF MALPICA-ORSINI

Appellees rely exclusively on this pre-Quilloin decision of the New York Court of Appeals (app.dismd. 423 US 1042), in order to justify stripping a man of his children without overcoming the hurdle of showing him unfit or of having abandoned them. Although Malpica-Orsini was the sole cited authority for the Georgia Supreme Court decision (Quilloin v. Walcott, 238 Ga. 230), it was not cited once by this Court in its affirmance.

If Matter of Malpica-Orsini is authority for anything, since Quilloin, it would be that on its record, there was no substantial constitutional question. The Jurisdictional Statement herein (pp. 16-17) extracted the essence from the stipulation which replaced testimony in that case to show that the stipulated facts "fleshed out no real bonds at all between parent and child" worthy of constitutional protection.

Appellees dispute this. They point to the record in that case to demonstrate that the statute was upheld

despite proof of a substantial parent-child relationship.

The difficulty with appellees' position is that they pointed to the wrong part of the record in Malpica-Orsini. They recite the claims made by the father in that case in his affidavit. Those claims were never proved. The father waived the opportunity to try to do so. He left all to stipulation. The parties did not stipulate to those allegations. The decision in that case did not rest on the allegations of the father's affidavit, but on the stipulation itself. The description of its contents in the Jurisdictional Statement is vindicated by a simple perusal of the stipulation.

A copy of that stipulation is appended to appellees' motion to dismiss or affirm. For convenience sake, it is also appended hereto.

CONCLUSION

The motion to dismiss or to affirm should be denied in all respects and probable jurisdiction should be noted.

Respectfully submitted this 17th day of April, 1978.

ROBERT H. SILK
Attorney for Appellant

Suite 1701
401 Broadway
New York, New York 10013
(212) 966-1545

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

- -x

In the Matter of the Adoption by :

CHARLES A. BLASI :

of :

HEATHER ALIXON MALPICA-ORSINI :

Foster Child. :

- -x

December 18, 1973
216 Central Avenue
White Plains, New York 10606

B e f o r e:

HON. VINCENT GURAHIAN
Judge of the Family Court.

Appearances:

FRANKLYN L. LOWENTHAL, ESQ.
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DELSON and GORDON, ESQS.
Attorneys for Mr. Hector Malpica-Orsini
Office and P. O. Address
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New York, New York 10017
BY: MARVIN SRULOWITZ, ESQ.
Of Counsel

Thomas A. Mahan
Court Stenographer.

THE COURT: Now, gentlemen, this record should indicate that we have had some considerable conferences on this case and we have spent more time in conferences than we have in taking testimony. I think you will agree the conferences have been most helpful because it reveals there is no truly substantial issue of fact involved in this case. What you are really dealing with, it seems to me, and I think that you will agree is a question of law. That question of law being the standing of a adjudicated putative to object to an adoption proceeding in the same manner and with the same degree and with the save privileges as would be accorded to an in wedlock father and we have phrased and framed certain stipulations which you would like to put on the record and which we can anticipate will be the basis for an appeal to another Court since this appears to be an issue that has not be resolved or even passed upon by the appellate court.

Am I correct as to the substance of what I have said?

MR. LOWENTHAL: Yes, your Honor.

MR. SRULOWITZ: Yes, your Honor.

THE COURT: Who will put the

stipulation on the record?

MR. SRULOWITZ: I will, your Honor.

It is hereby stipulated and agreed between the parties that;

(1) Corrine Caberti Blasi is the mother of Heather Alison Malpica-Orsini;

(2) That Mr. Orsini is the adjudicated putative father of Heather Alison;

(3) Mr. Charles Blasi is the proposed adoptive parent and is the lawful husband of the mother of the child;

(4) The mother consents to the adoption of her child by her husband;

(5) Mr. Orsini opposes the adoption of his child and has never signed any consent to such adoption;

(6) The objectant, Hector Orsini, has not consented to the adoption nor has he abandoned the child nor waived any other substantive rights he may have pursuant to statute;

(7) It is stipulated and agreed if the parties were called to testify that the Court would have sufficient facts before it, other than abandonment or other waiver of rights by Mr. Orsini, to exercise

its descretion to deny his objections and approve the adoption on the grounds that the overall best interest of the child would warrant it;

(8) There are no factual grounds to justify a finding that Mr. Orsini abandoned or neglected his child;

(9) If Mr. Orsini's standing to object to the adoption of his child under Domestic Relations Law Section 111, Paragraph 3 is to be treated in the same way as the father in wedlock his objections would be upheld and the adoption disapproved.

Next is the two legal questions, your Honor.

THE COURT: Gentlemen, before you get to that, I had suggested for various reasons to go into that and I think we should point out that both parties are cognizant of the fact, regardless of the outcome of this case, no purpose would be served by taking testimony that could some day prove to be of embarrassment either to the parties or to the child and I think that it is in that spirit both of you have agreed to dispense with taking further testimony recognizing, as I said before, that we are really dealing with two legal questions and not factual questions.

Now, I think you wish to state on the record

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6431

ABDIEL CABAN,

Appellant,

v.

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

APPELLANT'S BRIEF

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Appellees.

APPELLANT'S BRIEF

INTRODUCTION

This is an appeal from a judgment of the New York State Court of Appeals, as well as two subsequent judgments and orders of that court denying reargument. They dismissed appellant's appeal to that court from lower court orders dismissing appellant's objections to the adoption of his two children and approving their adoption by appellees, upon a holding that the constitutional issue was insubstantial. Appellant con-

tends that New York State Domestic Relations Law, §111, as it stood, and was construed and applied by the courts of New York, is unconstitutional in authorizing the adoption of appellant's children, who he was raising, without his consent.

The appeal was docketed on March 27, 1978, and probable jurisdiction noted May 15, 1978.

(a) The Opinions Below

The opinion of the Court of Appeals of the State of New York reported as *Matter of David A.C.*, 43 N.Y.2d 708, 401 N.Y.S.2d 208 (1977). (Appendix 45) That court dismissed the appeal from the order of the Appellate Division of the Supreme Court of the State of New York, Second Department. The same was reported as *Matter of David Andrew C.*, 56 A.D.2d 627, 391 N.Y.S.2d 846. (Appendix 41) The Appellate Division had affirmed orders of the Surrogate's Court, Kings County, which dismissed appellant's objections and approved the adoptions. The opinion of the Surrogate's Court was not reported. A copy is found at Appendix 27.

(b) Jurisdiction

These are two contested adoption proceedings. They were severally instituted by petition pursuant to Article 7 of the New York Domestic Relations Law, as it stood at the time, in the Surrogate's Court, Kings County. Each was to adopt a child of appellant. They were

decided by the court of first instance after a joint trial, in a single opinion but with separate orders dismissing appellant's objections and granting the adoptions despite appellant's constitutional objections. They were processed together on appeal. The court of first instance was upheld by the appellate courts of the State of New York. The issue culminated in a final judgment rendered by the highest court of New York State, where was drawn in question the validity of a statute of New York State on the ground of its being repugnant to the Constitution of the United States. The decision was in favor of its validity.

Jurisdiction of this appeal is conferred by 28 U.S.C. §1257(2) on the ground that a New York State statute, Domestic Relations Law, §111, as it stood, was construed and applied, is repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, but that its validity was necessarily sustained by the New York State courts in rendering the judgments on appeal.

The judgment of the Court of Appeals of the State of New York, sought to be reviewed, was entered November 17, 1977, in a memorandum. Two motions for reargument and rehearing were successively denied by orders filed January 10, 1978 and February 14, 1978, in the Court of Appeals. The notice of appeal was filed on March 10, 1978 in the Surrogate's Court, Kings County, and on March 13, and March 22, 1978, in the office of the Clerk of the Court of Appeals of the State of New York, the clerks of such courts together being possessed of the entire record.

Appellant entered his appearance and docketed his Jurisdictional Statement on March 27, 1978. The appeal was thus timely taken and docketed within 28 USC 2101 and Rule 13 of the The Rules of this Court.

Probable jurisdiction was noted by this Court, and leave to appeal *In Forma Pauperis* was granted on May 15, 1978.

(c) 1. Constitutional Provision Involved.

AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Statute Involved

New York Domestic Relations Law, §111, (14 McKinney's Consolidated Laws of New York, Annotated, copyright 1964, Cumulative Annual Pocket Part for use in 1976-1977, p. 51-52; McKinney's 1975 Session Laws of New York, Ch. 704, §3, p. 1117), (especially §111, subds. 2 and 3).

"§111. Whose consent required [Effective until Jan. 1, 1977]

Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

3. Of the mother, whether adult or infant, of a child born out of wedlock;

4. Of any person or authorized agency having lawful custody of the adoptive child.

The consent shall not be required of a parent who has abandoned the child or who has surrendered the child to an authorized agency for the purpose of adoption under the provisions of the social services law or of a parent for whose child a guardian has been appointed under the provisions of section three hundred eighty-four of the social services law or who has been deprived of civil rights or who is insane or who has been judicially declared incompetent or who is mentally retarded as defined by the mental hygiene law or who has been adjudged to be an habitual drunkard or who has been judicially deprived of the custody of the child on account of cruelty or neglect, or pursuant to a judicial finding that the child is a permanently neglected child as defined in section six hundred eleven of the family court act of the state of New York; except that notice, of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to a parent if the judge or surrogate so orders. Notwithstanding

any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child. For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a finding that such parent has abandoned such child.

Where the adoptive child is over the age of eighteen years the consents specified in subdivisions two and three of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in subdivision four of this section shall not be required if in his opinion the moral and temporal interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required by the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe."

(d) The Questions Presented for Review.

Do the provisions of New York Domestic Relations Law, §111(2,3), McKinney's 1975 Session Laws of New York, Ch. 704, §3, on their face and as applied, violate appellant's rights of Due Process and the Equal Protection of the laws granted by the Fourteenth

Amendment to the United States Constitution in authorizing the adoption of his children without his consent by a stranger and the termination of his parental rights without proof and a particularized finding that appellant was an unfit parent or had abandoned his children, upon the sole basis that the children were born out of wedlock and that appellant is the male parent, despite his strong family ties to his children; in denying the right of appellant to prevent the adoption of his children because of his sex and because they were born out of wedlock while granting such a right to mothers whether or not their children were born in wedlock and to fathers if their children were born in wedlock; and authorizing the mother of his children born out of wedlock to veto appellant's petition to adopt them but denying him the equal right to veto her petition, upon a classification based upon sex?

(e) Statement of the Case.

(1)

Summary

The single hearing for both contested adoption proceedings covered several days of testimony. When it concluded, a strong family relationship between appellant and his children had been proved despite lack of a marriage certificate between their parents. Appellant's love and affection for them and his supportive role as father was not shown to have been diminished by

absence of such a certificate. His abandonment of the children had been claimed in the adoption petitions but not proved. Unfitness on his part was neither alleged nor proved.

The proceedings culminated in the adoption orders. They terminated his parental relationship without his consent and supplanted him as father by a non-parent. The New York courts rested by upholding the constitutionality of a statute (Domestic Relations Law, §111, (2,3) making appellant's consent to adoption of his children unnecessary since

(1) the children were born out of wedlock. (This factor would have been insignificant if appellant had been female (§111, (3));

(2) Appellant was the male, not the female parent. (This factor would have been insignificant if the children had been born in wedlock (§111, (2)).

Neither statutory provision took into account the rights of a fit unwed father who cared for his children over the years to keep them.

Likewise, because of their respective genders, the mother was permitted to adopt her children and secure a higher jural relationship to them without the father's consent, but the father was denied the right to adopt his own children for lack of her consent.

(2)

The Pre–Birth Relationship of the Children's Parents and the Family which Resulted.

On direct examination, the mother, appellee Maria Mohammed, testified that she and appellant, Abdiel

Caban, established an out-of-wedlock family relationship with each other in 1968. (R. 72, 74) At the time, she was eighteen years old and he was thirty-one. (R. 73)

It was no abrupt fly-by-night relationship. Maria had known Abdiel all her life and their families were close. They commenced living together in Manhattan in September of 1968 (R. 73, 117), and then moved together to a new apartment in Brooklyn. (R. 73) Sex relations between the couple had already begun some two months earlier. (R. 118) She adopted his surname and became known as Maria Caban, holding herself out as his wife. (R. 125-128) Together, and with their two children, David Andrew and Denise, who were born of and into their relationship, they constituted a *de facto* family for some five years, until 1973, when she left. (R. 179) The unit was referred to as a family by the trial judge. (A. 28)

(3)

Birth of Children Into De Facto Family – Paternity Acknowledged – Family Relations.

The child, David Andrew Caban, was born into the family on July 16, 1969. Abdiel Caban is duly noted on the birth certificate as the father. (R. 74, 86) On March 12, 1971, the second child of the couple, Denise Caban, was born. (R. 78) Her birth certificate also records Abdiel as the father. In addition, at Maria's request, he formally acknowledged his paternity of Denise to the Board of Health. (R. 85-6)

From the outset, appellant always acknowledged to the world that he was the father of both children, to whom he had given his name. (R. 221, 336) He reaffirmed this at trial. (R. 336-7) His relationship with them has always been one of warmth and understanding, and he has always loved and cared for them. (R. 337) Maria's mother, who testified for appellees, conceded that this was true. (R. 222) The trial court found that Denise was too young to articulate but that David expressed love for his father. (A. 29)

At the trial, Maria complained that Abdiel was not a good provider. (R. 76-7, passim) Appellant countered that he provided for and contributed to the support of the children during the entire period they lived with him. (R. 337-340) The trial court accepted his testimony. (A. 28)

> "During this entire relationship both the natural mother and the putative father were employed and contributed to the support of the family."

Appellant did so while at the same time he helped to support two earlier children of a prior marriage. (A. 29; R. 390) He did not send Maria money for the children's support during the periods Maria kept them from him because she demanded that he terminate all contact with her. (R. 414-5)

At a loss for proof of appellant's unfitness, and admitting that he was never "cruel" to the children, (R. 180) Maria alleged only the familiar type of harsh conduct toward herself often claimed in matrimonial disputes and added a claim that appellant had borrowed some money from her which he still owed. (R. 189-190, 193)

(4)

Removal of the Children from Their Father's Home – Reestablishment of Contact – Appellees' Sending the Children to Puerto Rico.

After five years of family life together, when David was four and Denise two, Maria took the children from appellant and moved in with appellee, Kazim Mohammed in December, 1973. (R. 90) The appellees were married a month later. (R. 94)

As the father describes the incident of her departure with the children, he had returned home from work one evening in March 1974, to find the apartment empty. It was dark and the usual noises of children playing were missing. When he called out, there was no response. He searched the apartment for his family in vain. Upstairs, at the apartment of Maria's mother, he was told that their whereabouts was not known. He returned to his own apartment to find a note from Maria that she had taken the children and left. (R. 343)

Contact with the children was soon reestablished. Appellant made certain to see his children each weekend for some six months. (A. 28; R. 98, 345-350) They would sleep over in appellant's apartment and he would cook for them, play with them, take them to the park, celebrate holidays with them and enjoy a close fatherly relationship with his children. (R. 347-350)

The customary weekend visits came to an abrupt end. The children were sent off by their mother and stepfather, the appellees, to live with their maternal grandmother in Puerto Rico in September, 1974. (R. 165, 352) There they remained away from their parents for fourteen months. (R. 183)

(5)

Relations of Children with Paternal Side of Family – The Father Brought the Children Back with Him From Their Grandmother in Puerto Rico and Reassumed Their Custody and Care.

Appellant's children were full members of their father's family. Their paternal grandfather, Emilio Caban, came from Puerto Rico to testify. He fully considered the children as his grandchildren, as indeed they are. (R. 237)

The warm, natural, familial ties which the children enjoyed with their father's family emerge from the undisputed testimony. They add yet another dimension to the basic relationship with their father. (R. 237-250, 368-371)

While the children were in Puerto Rico, their paternal grandfather often visited them. He kept Abdiel advised on how they were doing. (R. 244) Up until the time Abdiel later assumed custody, he kept in touch with his children through his parents every few weeks. They kept him informed. (R. 358)

In November, 1975, Abdiel went to Puerto Rico to see his children. He had arranged for them to be at his parent's house, and spent the week with them there. Abdiel noticed that the children did not look well. They had acquired new habits of yelling and of disobedience. Problems that had not existed when the children were living with him had developed. They were described. (R. 360-367) Abdiel did not like the way they were being raised. He decided that it would be in his children's best interests to bring them back with him to New York, and he did. (R. 360-368) But not

without notifying Maria's parents where he could be reached. (R. 267-8)

At the time, there had been no court order respecting custody of appellant's children. There never was one awarding custody to the maternal grandmother. The curious statement in the Surrogate's opinion characterizing appellant's exercise of his parental responsibilities (A. 29-30):

> ("He justified his conduct in removing the children from their lawful custody by his concern for their welfare. His testimony is belied by the appearance and credible testimony of the maternal grandmother from whose temporary custody the children were snatched")

assumes that the conduct of Abdiel Caban in taking his own children under his own wing from a non-parent was somehow illegal. It was hardly that. There was no evidence that the maternal grandmother had custody rights of appellant's children equal to or greater than did appellant himself.

Upon Abdiel's return with his children to Brooklyn from Puerto Rico, he began the search for other quarters to accommodate his enlarged family.[1] He found a home and contracted to purchase it. (R. 371-4)

While the children were living in Brooklyn with their father, a neighbor, Mrs. Quanne, had the opportunity to observe the family closely. Mrs. Quanne testified that when she first saw them on their return from Puerto Rico, Denise was sick-looking, "coughing, croupie and

[1] Abdiel had obtained a divorce from his wife of a previous marriage that had long since been dead for many years. (R.353-4) He married his present wife, Nina, in December of 1975. (R.356-7)

very, very thin." (R. 227, 229) She saw the children every day and within two or three weeks they looked much better and were putting on weight. (R. 230) The neighbor described the relationship between Abdiel, his wife, Nina, and the two children as beautiful and lovely. The children were obviously happy and responded to his love with equal affection for their father. (R. 231-2)

They remained in their father's custody for two months, until January 15th, 1976. Appellant exercised full parental responsibility for them. He supported and cared for his children, provided for their health and medical needs, and furnished them with a warm, affectionate and secure home. (R. 227-232) At the same time, through his attorneys, he sought to work out custody arrangements with appellee, Maria Mohammed. (A. 29) In vain.

(6)

Custody Litigation in Family Court – Later Commencement of Adoption Proceedings in Surrogate's Court – Cross-Petitions – Last Days of Parenthood.

While appellant was thus taking care of his children in his own home, custody litigation between the parents began in Family Court. On January 15th, 1976, that court issued a temporary order placing the children with the mother and awarding visitation rights to the father pending a trial on the merits. The same was adjourned to await the outcome of the later-commenced adoption proceedings in the Surrogate's Court. No hearing on custody was ever held. (A. 29; R. 270-1,

374-9) Legal custody as between the contesting natural parents was never decided.

It was only after the Family Court custody proceedings had commenced and while they pended that appellees, both stepfather and the mother, petitioned for adoption in Surrogate's Court. (A. 3, 5, 8, 10, 22, 25, 29) Appellant objected. He and his wife, Mrs. Nina Caban, the children's stepmother, cross-petitioned. (A. 11, 16) From then until the adoption orders effected the abolition of his parental rights, appellant regularly saw the children at his home on a weekly basis. (R. 378-80) They were completely at home with their father and stepmother and engaged in normal family activities and pursuits. The family would go to a show, to a park, or just stay home and relax. They would all have dinner together, and in that manner the children would enjoy their stay with their father and their presently enlarged family which by now included also their stepmother and her own two children. (R. 379) Appellant saw to all of their physical needs, including medical attention, when they were with him. (R. 379, 431)

(7)

Appellant's Family Ties with His Children Dismembered and a Father Replaced as Parent by a Stepfather.

With the adoption orders of September 10th, 1976, all legal connection between father and children were abrogated. A blank wall was judicially erected to permanently and totally separate the children from their father.

Until the moment of their adoption by their stepfather, the children had lived more than half their lives in their father's home. As for the rest, they had been in steady weekly contact with him, except for the fourteen month separation which began when appellees sent them away to Puerto Rico and ended when appellant brought them home.

In order to allege some basis for ousting appellant of his parental rights and dismembering his family by adopting his children, appellees formally limited their claim to a charge that appellant had "abandoned" the children. (A. 4, 6, 7, 8) But they rested their case without proving it. Nor did they disprove appellant's fitness as a parent or challenge his lengthy and closely woven paternal relationship to his offspring. In the end, the court made no specific finding of unfitness, neglect or abandonment of the children by appellant.

The adoptive father, appellee Kazim Mohammed, professed to love appellant's children. But he had acquiesced in their separation from himself and from his wife for over a year until appellant went to Puerto Rico and brought them back. (R. 101, 104) Kazim's own relationship with the children had indeed been insignificant compared to that of the natural father. The Surrogate referred to Kazim's relationship to the children as a "new family". (A. 28) It was not until appellant brought his children back and furnished them with a home as a natural parent that the stepfather was bestirred to join with his wife and petition for their adoption.

The hearing officer, Law Assistant Renee R. Roth, professed ignorance of the substantive Due Process purpose of the hearing. (R. 253)

(cf. *Stanley v. Illinois*, 405 US 645, 658:

"All * * * parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.")

Involved here was the threatened permanent removal of appellant's children from his custody, or any possibility thereof. Ms. Roth resolved her doubts by concluding that: "The purpose of this hearing is to afford the putative father with a hearing." (R. 256-7)

The Surrogate was not similarly obsessed with doubts as to the purpose of the hearing:

"* * * a putative father's consent to such an adoption is not a legal necessity" (A. 27)

"The prime objective of allowing a putative father to be heard is therefore not to determine the degree of his continued interest in the child but rather to determine the best interests of the child. Any evidence the putative father may offer concerning the solidity of the marriage and the concern and treatment of the child in the new family is particularly relevant." (A. 28)

With one stroke, the court denigrated the natural father to the level of a semi-official law guardian, or an *amicus curiae*, without any substantial parental rights of his own to protect. Instead of treating the hearing as an inquiry into the father's fitness, as mandated by *Stanley*, the trial court ruled the issue to be the fitness of the would-be adoptive parents. Concluding that petitioning stepfather and mother were fit, the trial court, with all the proof of appellant's love and devotion to his children before it, and without a scintilla of evidence of his unfitness, neglect or abandonment, ignored his parental rights and granted the petitions to adopt.

The adoption orders resulted in Kazim Mohammed replacing appellant as legal father. They stripped appellant of the children he had sired, loved, raised and cared for. In turn, the children have forever been separated from their concerned and devoted father. David Andrew was then seven years old. Denise was five. Four and a half years of David's life and more than half of Denise's had been spent in their father's home and care. But now, by aegis of the state courts and §111 (2,3), a surrogate father has been installed in the natural parent's place, and only (a) because the surrogate father was found to be fit; (b) because appellant is a male, not a female, parent, he cannot by statute keep his children against a stranger's adoption petition (though he can and did contest the mother for their custody); (c) as an unwed father, he was by statute automatically disqualified from asserting a right to continue to care for his children against a stranger's adoption petition, though he had always conducted himself as would a devoted married father; (d) as an unwed male parent, the New York statute made it unnecessary to establish his unfitness or abandonment on his part to divest him of his children without his consent and replace him as father with a stranger; (e) and the highest court of New York, on appeal to it on the ground that the statute could not constitutionally have such consequences; held that it could and it did.

(8)

The Mother was Allowed to Adopt Without the Father's Consent but the Father Was Not Allowed to Adopt Without the Mother's Consent.

Appellant and his wife, Nina, had cross-petitioned for adoption. If Kazim was the "stepfather" (so-called by the Surrogate), Nina was the stepmother.

Appellant's refusal to consent to Kazim's adoption was irrelevant under the statute, simply because appellant was the unwed father. Appellee Maria Mohammed's refusal to consent to Nina's adoption was sufficient to bar it because she was the unwed mother.

At the same time, the natural father's cross-petition to adopt his own children was dismissed out-of-hand because the female parent had not consented and the statute made that necessary. (A. 27) On the other hand, the natural mother's petition to adopt (and gain a superior jural status as parent) was granted despite the non-consent of the male parent, because the statute made the consent of the male parent unnecessary. (A. 30)

(f) Summary of Argument

Appellant's family relationship to his children is such as is protected by the Fourteenth Amendment against enforcement of a New York State adoption statute (N.Y. Dom.Rel.L. §111 which authorizes taking his children from him and installing a stranger in his place as father without his consent.

The statute, which is construed and applied by the New York Court of Appeals permanently to deprive appellant, a fit and concerned natural parent, of the children he has (i) participated in raising since birth; (ii) for whom he has shouldered the full responsibilities of parenthood in their support, daily supervision and care; (iii) of whom he has enjoyed and shared, and at times exclusively exercised, actual custody as their father by an adopting stranger without his consent, violates appellant's fundamental substantive Due Process rights of parenthood.

Since appellant is a fit parent, New York's interest in caring for his children is *de minimus*, and the State lacks power permanently to take them from him by installing a stranger in his place as their father without his consent.

A statutory scheme which requires the consent of an unwed mother to the adoption of her child by a stranger, absent certain legislatively defined exceptions – not including parental unfitness – but makes the consent of the unwed father to such an adoption unnecessary under any circumstances, without regard to how fit and involved that unwed father may be with his children, is not closely tailored to effectuate an important state interest, impairs his fundamental constitutional and statutory rights upon the basis of an irrational classification grounded on sex, rather than parental fitness and the proven relationship of the father to his children, and violates the appellant's right to Equal Protection of the Laws in the continued enjoyment of his parental relationship with his children.

The New York statute, which requires the consent of a wed father to the adoption of his children, absent

certain legislatively defined exceptions – not including parental unfitness – but makes the consent of an unwed father unnecessary under any circumstances, without regard to how fit and involved that unwed father may be with his children, is not closely tailored to effectuate an important state interest, rests upon an irrational classification concerning the legal relationship of the parents to each other rather than parental fitness and the proven relationship of the father to his children, and violates the appellant's right to Equal Protection of the Laws in the continued enjoyment of his parental relationship with his children.

The New York statute, which authorizes a mother of children born out of wedlock to adopt them without the natural father's consent, but which requires the father to obtain the mother's consent as a condition to his adopting his own children, though he be a fit and concerned father with long and deep involvement as a parent in their care, is not closely tailored to effectuate an important state interest, discriminates against appellant because of his gender and violates his right to the Equal Protection of the Laws.

(g) Argument

POINT I.

APPELLANT HAS A RELATIONSHIP TO HIS CHILDREN WHICH IS ENTITLED TO SUBSTANTIVE DUE PROCESS SAFEGUARDS AND TO THE EQUAL PROTECTION OF THE LAWS.

That appellant has a constitutionally protected interest will be here discussed first. The nature and extent of that protection will then follow.

By *Quilloin v. Walcott*, ____ US ____, 98 S.Ct. 549, 54 L.Ed.2d 511, the Court laid to rest fears of applying the principles of *Stanley v. Illinois*, 405 US 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) to all unwed fathers on a purely biological basis, with the consequent granting of veto power over adoption to fathers lacking any substantial relationship to and interest in their children. The present appeal presents the parental rights of a father who has a full history of devoted paternal relationship and interest in his children, including daily parental responsibility for their welfare, to keep them against state action that would deprive him of them, though he is not shown to be unfit, solely because of his gender and his unwed status, and break up his family. Because of the soaring rates of illegitimate births, the problem affects large segments of the population.

Appellant's life with his children and his paternal ties to them has been described at some length under "*(e) Statement of the Case*", above. Suffice it to say, the necessity for an unwed father to be possessed of

substantial interest in his relationship with his children, such as is outlined in the "*Statement of the Case*", beyond mere biological parenthood, to entitle him to constitutional protections in opposing adoption, which was just elucidated by this Court in *Quilloin v. Walcott*, has been met. Quilloin had attacked the constitutionality of a Georgia statute which provided, as the New York statute has now been construed, that only the mother's consent was required for the adoption of a child born out of wedlock. He relied on the rights of parents, including unwed fathers, expressed in *Stanley v. Illinois*, 405 US 645. The Georgia Supreme Court (238 Ga. 230), had upheld the statute, resting exclusively on *Matter of Malpica-Orsini*, 36 N.Y.2d 568. *Stanley* was not disregarded. But the fact that in *Stanley*, "the father was a de facto member of the family unit", but not in *Quilloin*, was held enough by that court to distinguish it. (238 Ga., 233-4)

This Court affirmed in a unanimous opinion by Mr. Justice Marshall. Neither *Malpica-Orsini*, nor this Court's dismissal of the appeal therein (*Orsini v. Blasi*, 423 US 1042), was mentioned. The holding rested on the unsubstantial relationship between the Georgia father and his child, which had left the paternal shoes empty in a real sense and ready to be filled by the stepfather.

These factors were ruled by the Court to be dispositive. In substance, the Court held that an unwed father had to be a father in more than name only. With this as the crucial factor, whether a statute is constitutionally applied would depend on the facts at bar in each case. The Court reaffirmed *Stanley v. Illinois* but approached the problem of its application by noting that

"Stanley left unresolved the degree of protection a State must afford to the rights of an unwed father, in a situation such as that presented here, in which the countervailing interests are more substantial." (54 L.Ed.2d, 515)

The facts at bar are quite different. Simply to compare them with those lacking in *Quilloin* is to demonstrate that they fill the vital gap necessary to invoke *Stanley* in protecting the rights of unwed fathers in adoption cases. Appellant was shown to have had substantially the same fatherly relationship to his children as he would be expected to have had if they had been born in wedlock. *Quilloin* holds that this is key to the existence of a substantial constitutionally protected interest in that relationship.

The effect of the adoption orders on appeal was to terminate appellant's parental rights. (See *Matter of Anonymous (St. Christopher's Home),* 40 N.Y.2d 96, 97-8, 386 N.Y.S.2d 59 (1976)). Nevertheless, though a solid family relationship existed between father and children, the New York courts construed Domestic Relations Law, §111 as authorizing their adoption by a stepfather, without appellant's consent, and thus putting an end to it. They overruled his objection that the statute could not allow such a result consistent with the Fourteenth Amendment absent proof or findings of unfitness by holding that it constitutionally did so. They cited *Matter of Malpica-Orsini,* a case which despite the sweep of its opinion was limited to upholding the constitutionality of the statute. They thereby rested their holding upon a similar finding of constitutionality of the statute. *Matter of Malpica-Orsini* was a case resting on a bare bones conclusory

stipulation in lieu of testimony, in which there was a total absence of proof of a meaningful relationship between father and child such as appellant and his children enjoy here. This was of course vital to the issue as stated in *Quilloin.*

The present case is quite different. It is "[t]he private interest here, that of a man in the children he has sired and raised" which appellant has demonstrated exists after an extensive hearing that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois,* 405 US, 651.

Quilloin holds that the facts demonstrating the existence of such an interest must first be shown. They were.

POINT II.

THE NEW YORK COURTS, ACTING PURSUANT TO N.Y. DOM. REL. L. §111 (2,3) IGNORED APPELLANT'S CONSTITUTIONALLY PROTECTED RELATIONSHIP WITH HIS CHILDREN AND DENIED HIM SUBSTANTIVE DUE PROCESS OF LAW.

The courts below approved adoption of appellant's children by a stranger. This effectively stripped appellant of his parental rights. *Matter of Anonymous (St. Christopher's Home),* 40 N.Y.2d 96, 97-8 (1976). Paying only ritual respect to *Stanley v. Illinois,* 405 US 645, while ignoring its mandate, the courts below gave with the one hand ("an opportunity to be heard") while they took away with the other the rights of

appellant guaranteed by the Fourteenth Amendment to maintain his parental ties with his own children absent a threshold finding, based on proof, of his own unfitness. *Stanley v. Illinois*, supra; *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543. There was no such proof. There was no such finding. The evidence was quite to the contrary. This is manifest both from the transcript and from the total absence of any finding or adjudication of unfitness or like factor in the opinions below.

The Surrogate's Court did not treat the hearing as one into the fitness of the natural father, which *Stanley* said was necessary, but which the courts below disregarded, but as limited to the fitness of the petitioning stepfather. It decided the case on that basis. The natural father was "treated not as a parent but as a stranger to his children", which *Stanley* held violates constitutional rights (405 US, 648). The Appellate Division affirmed on the ground that the result was justified by N.Y. Dom. Rel. L., §111, which it held to be constitutional. The Court of Appeals agreed.

The natural father was regarded below much as an unofficial law guardian, an *amicus curiae*, an evidence gatherer on the stepfather, with only an adjective right to be heard on the question of his replacement's fitness, but no substantive parental rights of his own to protect. To justify this, the New York courts, in effect, amended *Stanley v. Illinois* by removing the words "on their fitness"[2] from the language of the United States

[2] See Comment, Getman, "The Unwed Father's Rights in Adoption Proceedings", 40 Albany Law Review 543 (1976): "The Supreme Court held [in *Stanley v. Illinois*], it would seem, that the parental rights of an unwed father could not be *(continued)*

Supreme Court, when it held:

> "[All parents] are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." (405 US, 658)

The case was decided as though the children's natural father "had no [substantive] rights which [the court] was bound to respect." (cf. *Dred Scott v. Sanford*, 19 Howard 393). The approach is at odds with current concepts. It is completely out of date. It is contrary to present perceptions of justice and to the law as this Court has shown it to be today.

Decisions of this Court with respect to rights of parents under the Fourteenth Amendment should be accepted as binding in New York as in any other State. This elementary proposition was accepted by the New York Court of Appeals in *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 545-6. *Stanley v. Illinois* was there recognized as the font of the "existing constitutional principles" which limit the exercise by the State of *parens patriae* power "to supplant parents except for grievous cause or necessity." Said New York's high court in *Bennett v. Jeffreys*, (40 N.Y.2d, 548):

> "Indeed, as said earlier, the courts and the law would, under existing constitutional principles, be

(footnote continued from preceding page)

terminated without proof that the father was unfit. The State interest in the welfare of children was not served by terminating the parental rights of a fit parent, whether that parent be married or unmarried. The Court therefore set a minimum substantive due process standard for the termination of parental rights – parental unfitness. It is from this substantive due process basis that the Court turned to the procedural aspects of the case." [p. 550] "Procedural due process requires that an unwed father be given a hearing, and according to the Stanley opinion, substantive due process requires the hearing to be on his fitness." [561-2]

> powerless to supplant parents except for grievous cause or necessity (see *Stanley v. Illinois*, 405 US 645, 651, *supra*, in which the principle is plainly stated and stressed as more significant than other essential constitutional rights)."

In ringing terms, the Court of Appeals left no doubt where the law lies in the wake of *Stanley*: (40 N.Y.2d, 552)

> "In all of this troublesome and troubled area there is a fundamental principle. Neither law, nor policy, nor the tenets of our society would allow a child to be separated by officials of the State from its parent unless the circumstances are compelling."[3]

No "compelling" circumstances were shown here to justify the separation of children from parent. Nor did the courts below find any.

It was the stepfather's burden to prove that appellant's right not to be replaced as parent had been forfeited. But there was no proof. There was none that appellant was unfit or that he had lost his parental rights. The stepfather did not establish that the State had the power to take Mr. Caban's children away from him and hand them over to him. Upon the basis of this record, State power to grant the adoptions and destroy a parental relationship by terminating appellant's rights to be linked to his children and their rights to their own father, in order that they be placed under the parentage of a stranger, was lacking.

[3]This is quintessential "*Stanley*". The Court of Appeals ironically accepts it as the law of the land when applied to mothers (*Bennett v. Jeffreys*), but not where the separation of a child from an unwed father is involved, as it was in *Stanley* and at bar.

As long ago as 1912, a New York court had held the rights of parents to their children, "even in primitive civilizations, as one of the highest of natural rights." *Matter of Livingston*, 151 App.Div. 1, 7. *Stanley v. Illinois* held them to be among the highest ranked of all constitutional rights. (405 US, 651)

The courts below ignored these fundamental principles. By deciding the case on the sole basis of the fitness of the stepfather, they deprived appellant of the children he had sired, reared, raised, loved, protected and tenaciously kept his ties to.

These constitutionally protected rights of parents belong to fathers as well as to mothers. Marriage between the parents is irrelevant to them. They are forfeit only upon proof of parental unfitness, surrender, abandonment, persisting neglect or other similar extraordinary circumstances. They are otherwise beyond the reach of any court. *Stanley v. Illinois*, 405 US 645 (1972); *Rothstein v. Lutheran Social Services*, 405 US 1051 (1972); *Vanderlaan v. Vanderlaan*, 405 US 1051; cf. *Weinberger v. Wiesenfeld*, 420 US 636, 652 (1975), 95 S.Ct. 1225, 43 L.Ed.2d 514.

In *Stanley*, the rights of an unwed father to maintenance of his parental relationship to his children was litigated. The Court first examined the substantive rights involved: (405 US, 651)

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for

respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurther J., concurring).

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), 'basic' civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights,' *May v. Anderson*, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. . . .

(652) These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is recognizable and substantial."

The issue at stake for the father in *Stanley*, as here, "is the dismemberment of his family." (405 U.S. 658). The holding was that natural fathers, like all parents, whether married or not, "are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." (ibid, 658)

This is not to say, as did the court below, that a hearing on the fitness of strangers proposing to adopt their children is all that parents are entitled to.

> "The State's interest in caring for Stanley's children is *de minimus* if Stanley is shown to be a fit father." (405 U.S., 657)

That alone was the issue in this case. On the record, there being no proof of his unfitness, or other extraordinary factors, State power to dismember his family did not exist and the petitions should have been dismissed. To regard the hearing on the fitness of the petitioning stepfather as sufficient is to give appellant the right to a swan song. Due Process has more substance than that.

In *Rothstein v. Lutheran Social Services*, 405 US 1051, the Court first held that the principles laid down in *Stanley* apply equally to adoption cases. It vacated the holding of the Supreme Court of Wisconsin in *State v. Lutheran Social Services*, 47 Wisc.2d. 420, 178 N.W.2d. 56, 63 "that the putative father of a child born out of wedlock does not have any parental rights." As stated in the overturned Wisconsin case (178 N.W.2d., 61)

> "The question presented is whether the state of Wisconsin can protect the right of married parents and unwed mothers to the custody and control of their children by requiring their consent as a prerequisite to the termination of their parental rights without affording similar protection to the rights of a putative father."

Setting the Wisconsin court's holding aside, the United States Supreme Court answered that question with a resounding "no". It referred simply to *Stanley v. Illinois* as its authority.

It is now clear from *Quilloin* that the principles of *Stanley v. Illinois* continue to apply to adoption cases despite the earlier dismissal in *Orsini v. Blasi* of the appeal based on a paper-thin record from the *Malpica-Orsini* holding. As this Court pointedly noted in *Quilloin* (54 L.Ed.2d., 520):

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith v. Organization of Foster Families for Equality and Reform*, 431 US 816, 97 S.Ct. 2094, 53 L.Ed.2d. 14 (1977) (Stewart, J., concurring)"

Within *Quilloin*, appellant had a constitutionally protected relationship with his children, deserving of protection against the state statute and judicial acts, which it authorized, depriving him of his parentage in the absence of proof and specific finding of unfitness, under the Due Process Clause. N.Y.Dom.Rel.L., §111 (2,3) cannot withstand constitutional scrutiny by providing that Caban's children can be taken away from him without his consent.

POINT III.

APPELLANT HAS BEEN DENIED EQUAL PROTECTION OF THE LAWS.

A.

Arbitrary Nature of the Classifications – Generally.

The complete and total irrationality of the statutory classification based on sex and legal relation of the parents to each other, by virtue of which appellant would lose his children under the New York statute, is made very clear when §111 is read in its entirety. It spells out the limited exceptions to the rule in subdivisions 2 and 3 that the consent of female and wedded male parents is needed for adoption of their children. If only appellant had been born female and was a mother, or if he had been properly married – there was no such requirement for Maria – he would not now be before this Court.

Justification for the statutory distribution of rights to some parents and denial to others must be found in whether the statute rationally limits itself to the promotion of the welfare of children. It does not advance a legitimate state interest in protecting its children's right to grow up in normal homes when it creates, as it does, a legislative scheme whereby mothers and married fathers who are proved in fact in the adoption proceedings themselves to be (a) cruel and neglectful toward their children; (b) persons who chronically and habitually use alcoholic beverages to the extent that they have lost the power of self control with respect to their use and who, by reason of

alcoholism, endanger their own and their children's health, safety and welfare; (c) so advanced in age, so ill, so infirm, so weak mentally, suffering from intemperance, drug addiction and otherwise from substantial impairment of ability to care for their own property, to provide for themselves and their children to the degree that, in a proper proceeding, their property could appropriately be placed in a conservatorship; (d) persons who because of mental deficiency are unfit to care for their children and incapable of managing their own affairs; (e) parents who have surrendered their children to private parties; and (f) persons who for whatever other reasons are unfit parents, may still veto adoption of their children.

Section 111 (2,3) requires the consent even of mothers and married fathers possessed of such questionable qualities as a matter of proven fact. While §111 carves out certain carefully defined exceptions to the rule requiring consent, mothers and married fathers so endowed do not fall within the exceptions. They keep their veto – and their children. But a veto is denied to appellant, a fit and devoted father without any of the same drawbacks. He loses his children and they lose him. That is the meaning of §111.

(a) If appellant were a she or a married father, he would have been able to veto the adoption even if it had been proved in the Surrogate's Court at the adoption hearing by a courtroom full of witnesses that he was in fact cruel and neglectful to his children – so long as, perchance, a court other than the Surrogate's Court, which itself lacked jurisdiction, on an earlier occasion had not deprived him of custody of the children for those reasons, or pursuant to a judicial

finding that a child is a "permanently neglected child as defined in section six hundred eleven of the Family Court Act of the State of New York." (cf. *Matter of Sanjivini K.*, 40 N.Y.2d. 1025) (§111)

(b) If he were a she or a married father, he could veto an adoption even if it were proved conclusively that he was in fact an "alcoholic"[4] – so long as, perchance, he had not been "adjudged to be a habitual drunkard" in a different proceeding in a court other than the Surrogate's Court which lacked jurisdiction. (N.Y. Mental Hygiene Law, §78.01)[5] (§111)

(c) If he were a she or a married father, he could veto an adoption even if it were proved that he was in fact, "by reason of advanced age, illness, infirmity, mental weakness, intemperance, addiction to drugs, or other cause [suffering from] substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support," and even if found warranted in a proceeding brought for that purpose in a different court that his property be placed under conservatorship under N.Y. Mental Hygiene Law, §77.01 – just so long as, perchance, he "has not been judicially declared incom-

[4] See New York Mental Hygiene Law, §1.05(14): " 'alcoholic' means any person who chronically and habitually uses alcoholic beverages to the extent that said person has lost power of self control with respect to the use of such beverages or who, by reason of alcoholism, endangers the health, safety, or welfare of himself or others."

[5] §78.01: "The supreme court, and the county courts outside the city of New York, have jurisdiction over the custody of a person and his property if he is incompetent to manage himself or his affairs by reason of * * * drunkenness, * * *"

petent" by another court.[6] Such an impaired person is a "conservatee" under §77.01. If a mother or married father is adjudged to be that type of crippled human being, her or his need to consent to adoption is not waived by the specific exceptions contained in §111, but it would still be required.

(d) If he were a she or a married father, he would be able to veto an adoption even if it were proved by a host of reliable witnesses that he was unfit, in fact, properly to care for his children because of mental deficiency or a mental impairment technically not within the statutory definition of "mental retardation."[7] That is because "mental deficiency" is defined differently from "mental retardation" and it is only if he were "mentally retarded as defined by the Mental Hygiene Law" that he would lose his right to withhold his consent to the adoption of his child. Mere unfitness

[6] N.Y. Mental Hygiene Law, §77.01:

"The supreme court, and the county courts outside the city of New York, if satisfied by clear and convincing proof of the need therefor, shall have the power to appoint one or more conservators of the property (a) for a resident who has not been judicially declared incompetent and who by reason of advanced age, illness, infirmity, mental weakness, intemperance, addiction to drugs, or other cause, has suffered substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support, * * * Such person for whom a conservator is appointed is hereinafter designated as the 'conservatee.' "

[7] Mental Hygiene Law, §1.05(18): "Subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior."

due to "mental deficiency" would not take that right from him.[8] (§111)

(e) If he were a she or a married father, he would be able to veto adoption of his children even if it were shown that he has surrendered these children to a private person – to the extent of losing his constitutional right to prevent termination of his parental rights (cf. *Matter of Bennett v. Jeffreys*, 40 N.Y.2d. 543, 550) – because the statute makes his consent nonetheless necessary so long as surrender is not to "an authorized agency under the provisions of the Social Service Law." (§111)

(f) If he were a she or a married father, he could veto adoption of his children even if it were established beyond a reasonable doubt at the adoption hearing that he was unfit as a parent for any number of other reasons than enumerated in the statute – for parental unfitness, as such, is not a ground for allowing adoption without the unfit female or married male parent's consent. (§111)

Appellant, however, does not suffer from any of the above problems. His is worse than all of them put together. He is the father, not the mother; and he was not married to the mother. That is enough in New York to cast him outside the fold of those parents, including those referred to in (a) through (f) above, who are privileged by §111 to keep from being replaced.

[8] N.Y. Mental Hygiene Law, §67.07: " 'Mental deficiency' shall mean mental deficiency as defined by appropriate clinical authorities to such extent that a person so afflicted is incapable of managing himself and his affairs, but shall not include mental illness as defined herein."

The need of children to be raised by loving parents is not advanced by this discriminatory classification. Their interests appear not even to have been considered. New York children, no less than unwed fathers concerned with their own offspring, are senselessly penalized with the loss of a basic human relationship. The statute fiercely protects the rights of "many persons who have, at best, a remote and indirect interest" in their children, "and, on the other hand, excludes others" (such as appellant) "who have a distinct and direct interest in" them. (cf. *Kramer v. Union Free School District*, 395 US 621, 632 (1968)[8a,9] An important consequence is that some children will be denied a needed chance to have wholly unfit natural parents exchanged for loving adoptive ones because their unfit

[8a]"Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense.
Something there is
that doesn't love a wall,
That wants it down."
From Mending Wall
by Robert Frost

[9](See Malone, Comment, 44 Fordham L.Rev. 646, 656-7 (1975) "The infirmity of section 111(3) is that in pursuit of the admirable goal of the child's best interests, the legislature has unnecessarily demeaned the basic rights of the unwed father to the maintenance of his relationship with a child he has sired and raised. Ironically, under the ironclad presumptions of the present statute, the consent of the unfeeling and irresponsible unwed mother or divorced father is a prerequisite to adoption while the constructive and loving contact between an unwed father and his child is terminable by adoption without the father's consent. In this way the statute can frustrate the very purposes for which it was designed.

So long as the legislature chooses to retain the present statutory scheme, the continued denial of full parental status to the unwed father who has assumed parental responsibility for his child is unjustified.")

mothers or married fathers may refuse for whatever reason to consent to their adoption; while still other children, with devoted natural fathers, will be forced to exchange these natural parents for adoptive fathers and come of age with the deep-seated ache to know their roots with natural fathers of fond but distant memory whom they lost only because their parents were not married, despite their father's best efforts to keep them.[10]

Where fundamental rights are discriminatorily withheld, as here, the human right to keep one's own children, and – as in *Kramer*, the political right of franchise – "* * * the issue is not whether the legislative judgments are rational. A more exacting standard obtains." If the classification between those who may, and those who may not, exercise, such rights is not closely tailored to furtherance of a "compelling State interest", it must fall under the Equal Protection Clause. [ibid., 633]

B.

Sex as the Standard – Viewed Separately

Both on its face and as construed and applied here, §111 allows one parent of a child born out of wedlock the right to veto the other parent's adoption petition,

[10]The often empty longing of adopted children to know their roots and their natural parents, the reciprocal longing of the natural parents themselves for children whom they had voluntarily, unlike appellant, given up for adoption, and their frequent search for each other, carefully considered in Sorosky, Baran, Pannor, *The Adoption Triangle*, Anchor/Doubleday, Garden City, 1978.

so long as the parent vetoing was the natural mother who had sent her young children thousands of miles away to live with a grandparent and the parent being vetoed the father, who had brought his children back home. Whether there was a right to veto adoption is made to depend on the sex of the parent. Short shrift was accordingly given to appellant's cross-petitions for adoption below. (A. 11, 16) Appellant being male, the trial court merely noted that a "putative father opposing such an adoption [by the stepfather], without the consent of the natural mother, has himself no prospect of adopting the child." (A. 27)

The male parent, however, has no corresponding right to veto. Thus, because of his sex, the statute denies a right to this fit and concerned father, to veto an adoption of his children by a stranger, which would forever take his children from him.

The contrast between the unwed father's equality with the unwed mother in child custody cases and his abject helplessness against an outside male's petition to adopt his children and permanently deprive him of them and them of his is spectacular.

A New York statute provides:

(N.Y.Dom.Rel.L, §70)

> "In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly."

Accordingly, in custody disputes between the parents of children born out of wedlock, unwed father's rights have been strictly protected and treated as equal to the

mother's in New York in safeguarding the child's best interests. *Matter of Hilchuk v. Grossman*, 57 A.D.2d. 798, 394 N.Y.S.2d. 400 (1977). Where the facts indicate, an award will be made to the unwed father as against the unwed mother under §70. *Matter of Boatright v. Otero*, 91 Misc.2d. 653, 398 N.Y.S.2d. 391 (1977). As against a non-parent, such as a stepfather or the maternal grandmother in Puerto Rico, the unwed natural father clearly has a superior right to custody. *Raysor v. Gabbey*, 57 A.D.2d. 437, 395 N.Y.S.2d. 290 (1977) (note *Vanderlaan v. Vanderlaan*, 405 US 1051, 92 S.Ct. 1488, 31 L.Ed.2d. 287, reported on remand at 9 Ill. App.3d. 260, 262, 292 N.E.2d. 145, 6 (1972) where it is held that a father cannot be barred from asserting custody of his children born out of wedlock under *Stanley v. Illinois*).

Since their rights at the outset were equal, and appellant was a devoted parent, there was a distinct possibility that he might have been awarded legal custody in the children's best interest if the custody proceedings, which began before and pended throughout the adoption proceedings, had instead gone to conclusion on the merits. There is nothing in the record to have foreclosed that possibility. But only in that case would §111(4) have given appellant the right to prevent loss of his children to a stranger.

His constitutional right is made to depend not on his solid family ties but on "legal" custody. This is because of his sex. But on the other hand, the female parent is allowed to veto adoption by the father of his own children even if her legal custody is merely temporary – even if it had been ultimately terminated and custody awarded to the father by the Family Court in

the children's best interest – even if she did not possess any legal or actual custody at all. This is because of her sex.

The statutory distinction based on the sex of the parents is thus totally irrational. It violates both Due Process and Equal Protection. It has deprived appellant of his children and this Court should so declare its unconstitutionality.

> "[*Reed v. Reed*, 404 U.S. 71 (1971)] emphasized that statutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.' 404 U.S., at 75. To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451 (1976)

The challenged statute here does not and is not.[10a]

[10a] Referring to the invalidity of its own adoption statute under the Pennsylvania Constitution's Equal Protection Clause, the high court of that state held: "It is clear that, as a consequence of section 411, unwed fathers have no rights under the Adoption Act, while unwed mothers have all the rights of married parents. The only differences between unwed fathers and unwed mothers are those based on sex. This is an impermissible basis for denying unwed fathers rights under the Act." *Adoption of Walker*, 468 Pa. 165, 170-1, 360 A.2d 603, 605-6 (1976) The court pointedly noted: "Federal constitutional law compels the same result we reach on the basis of the Pennsylvania Constitution. [Stanley v. Illinois, 405 U.S. 645]" (468 Pa., 171n, 360 A.2d, 606n.)

C.

Marriage to the Mother as the Standard – Viewed Separately.

A further discriminatory statutory classification is based on the fact that the children were born into an out of wedlock *de facto* family, resulting here in further violations of Equal Protection. The argument that the unwed father is entitled to the same rights as a married one had been made and rejected in *Quilloin* (54 L.Ed.2d, 520) only because the father there did not show the existence of a close and responsible relationship to his child deserving on balance of protection. The facts are otherwise here, as has been shown. The time has come for this Court to pronounce as applicable to adoption statutes, as here and similarly applied, the holding in *Stanley v. Illinois*, (405 US, 651-2):

> "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. *Levy v. Louisiana*, 391 US 68, 71-72 (1968). 'To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.' *Glona v. American Guarantee Co.*, 391 US 73, 75-76 (1968)." cf.

People ex rel Slawek v. Covenant Children's Home, 52 Ill.2d. 20, 284 N.E.2d. 291 (1972)"

A mere legal marriage does not a true father make. To have denied appellant the rights of a married father to preserve his parental ties under the facts here on the basis of the §111 classification is to violate his rights to Equal Protection. The statute is unconstitutional as applied for that reason as well, and the Court should so hold.

D.

Unsupported Presumption in Place of Proof Includes Appellant in Over-Broadly Defined Class Without Rights.

Whether the classification based on sex or that based on marital status of parents is considered alone or together with each other, it is founded on a conclusive, irrebuttable presumption which the statute makes appellant powerless to defeat: that he is somehow, because of his sex and non-marital status, less than fit as a parent. While §70 properly provides for the absence of any presumptions "in all cases" between parents involving custody, §111 in effect creates a conclusive presumption of unfitness of even the best of unwed fathers. It violates the *Stanley* precept against "presuming rather than proving * * * unfitness solely because it is more convenient to presume than prove." (405 US, 658) (See *Vlandis v. Kline*, 412 US 441 93 S.Ct. 2230, 37 L.Ed.2d. 63 (1973) on the violation of Due Process by a permanent unrebuttable presumption that may not be true).

Proceeding by unrebuttable presumption in this case is totally unjustified. As expressed in *Stanley* (405 US, 654-5):

> "It may be, as the State insists that most unmarried fathers are unsuitable and neglectful parents. . . . But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children."[11, 12]

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[11] Herzog, *Some Notes about Unmarried Fathers*, Child Welfare, 25:194 (1966) (Elizabeth Herzog, Chief, Child Life Studies Branch, Division of Research, Children's Bureau, Welfare Administration, U.S. Department of Health, Education, and Welfare, Washington, D.C.)

"Misconceptions About Unmarried Fathers

Despite the dearth of research, we have enough evidence to show that a number of cliches, or stereotypes, or misconceptions about unmarried fathers do not stand up under inspection. For brevity, I am merely going to state four of them, without attempting to document my statements and without their full quota of qualifications.

1. According to our reading of the evidence, it is not true that the unmarried father's relations with the unmarried mother are usually fleeting and casual. On the contrary, for the great majority, the children born out of wedlock represent the involvements ranging from months to years in duration, and from affection to love – or to what felt to be love at the time but was later defined as temporary infatuation.

2. It is not true that the unmarried father is typically an exploiter of someone much younger, poorer, or less educated than himself. On the contrary, he tends to resemble the unmarried mother in age, in socioeconomic status, and in education.

3. It is not true that if marriage is considered, the unmarried father is invariably the reluctant member. On the contrary, sometimes he wants marriage and she does not.

(continued)

The Court approvingly cited *In re Mark T.*, 8 Mich. App. 122, 154 N.W.2d. 27 (1967) in its footnote for the following observation: (405 US, 654-5n.)

> " 'We are not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper unbringing than one reared by his natural father who was at one time married to his mother, or that the stigma of illegitimacy is so pervasive it requires adoption by strangers and permanent termination of a subsisting relationship with the child's father."

The statute's discriminatory classification based exclusively on sex and marriage cuts a wide swath into one of the most precious human relationships, that of parent and child. The right of a parent to raise his own child is fundamental. *Stanley v. Illinois*, 405 US, 651. A statute which creates discriminatory classifications of persons who may and may not exercise a fundamental human right requires critical examination by this Court.

(footnote continued from preceding page)

4. According to our reading of presumptive evidence, which is the only kind we have on this point, it is not true that to become an unmarried father is an unfailing symptom of psychopathology, calling for therapy. On the contrary, there is enough evidence about unmarried mothers to rule out the blanket assumption that pregnancy out of wedlock inevitably or even usually indicates pathology on the part of the unmarried mother, and there seems no reason to assume more pathology on the part of the unmarried father."

Also, Pannor, Massarik, Evans, *The Unmarried Father*, (Springer, N.Y. 1971) p. 85.

[12]Sorosky, et al. (supra, n. *10*), p. 49: "Recent studies have looked at the role of the unwed father in depth. These demonstrated that he is not an irresponsible 'swinger' and is more concerned about the pregnancy and his offspring than has been recognized."

Zablocki v. Redhail, ____ US ____, 98 S.Ct. 673, 679, 54 L.Ed.2d. 618 (1978).

Zablocki dealt with an Equal Protection violation of the right to marry. The Court placed it and the right to raise one's children and maintain family relationships "on the same level" (98 S.Ct., 681, 54 L.Ed.2d, 630). In language which could appropriately serve for the case at bar, the Court stated (98 S.Ct., 682, 54 L.Ed.2d, 631):

> "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

The burden to uphold the classification rests, under *Zablocki* principles, upon appellees who are benefitting from it. There is no "sufficiently important state interest" in this case to justify tearing this father from his children.

The breadth of the statute lumps together and denies rights to fit and unfit fathers of children born out of wedlock alike (but preserves rights to unfit married fathers); it joins unwed fathers with deep and basic parental relationships and family ties with their children in a common denial of rights with unwed fathers who have lacked any interest at all following the act of procreation – but preserves the rights of totally disinterested married fathers.

It prevents a fit father with the right to assert his own custody rights of his children as against a claim of the natural mother from asserting parental rights and vetoing their adoption by a total blood stranger, all because of his sex and lack of a legal relationship to the

mother – while it grants the same mother, who lacked a legal relationship with him and who is litigating the rights of custody with him in another court (and who might lose them to him), the right to veto his adoption of his own child.

At the same time, without any state interest in promoting adoption by mothers of out of wedlock children, but not fathers, it permits the mother to certify the jural relationship of the children to herself by adopting them without the father's consent – though without her consent he is barred from doing the same thing.

The reference in *Zablocki* (concurring opinion, Stevens, J., 98 S.Ct., 691) to an equally wide-ranging statute as

> "a statutory blunderbuss * * * * This clumsy and deliberate legislative discrimination * * * is irrational in so many ways that it cannot withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment."

also well describes §111 (2,3).

Just as this Court held in *Stanley* that denying a hearing on fitness "to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause," (405 US, 658), so too the gender-based wedlock-based classifications in §111 are arbitrary, invidious, irrationally discriminatory and violative of appellant's rights to Due Process and to the Equal Protection of the Laws, both on its face and as applied.

(h) Conclusion.

For the foregoing reasons, the judgment of the New York Court of Appeals was violative of appellant's rights under the Fourteenth Amendment of the Constitution of the United States and should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1977

No. 77-6431

ABDIEL CABAN,

Appellant,

vs.

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

On Appeal from the New York Court of Appeals

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

JURISDICTIONAL STATEMENT

Appellant Abdiel Caban, an unmarried father, appeals pursuant to 28 U.S.C. §1257(2) from a judgment of the New York Court of Appeals (and from two orders of that court denying reargument).

In essence, on the basis of the best interests of the children, the judgment granted a petition for adoption by the natural mother and stepfather of the children over the objection of the appellant, their unmarried father.

THE DECISIONS BELOW

After granting appellant, an unmarried father, a three day hearing (378 pages of testimony), the Surrogate, in an opinion dated August 3, 1976, granted the petition of the natural mother Maria Mohammed and the stepfather Kazim Mohammed, to whom she had been married for over 2½ years, to adopt the two children David and Denise [Opinion reported at (A27-30)].

The standard applied by the Surrogate was the New York standard of "the best interests of the child." Contrary to appellant's contentions, the Surrogate did, as was required by the New York standard, consider the "fitness" and "concern", and as well the "character" of the appellant Abdiel Caban. Observing however, that since this was not an adoption by blood-strangers to the children which would require the application of New York's modified "flicker of interest rule" but instead an adoption by the mother and stepfather into an existing family unit, the Surrogate based his decision on the relative fitness and countervailing interests of the competing parents.

The New York Appellate Division, Second Department, after hearing argument, affirmed four orders of the Surrogate in a brief memorandum opinion (56 A.D. 2d 627, reported in full in Appellant's Appendix, pp. 41, 42). The Appellate Division cited as authority *Matter of Malpica-Orsini,* 36 N.Y. 2d 568, *appeal dismissed, January 12, 1976, sub nom. Orsini v. Blasi,* 423 U.S. 1042.

The Court of Appeals, after hearing argument, affirmed the order of the Appellate Division (43 N.Y. 2d 708, reported in full in Appellant's Appendix, p. 45) and dismissed the appeal citing its earlier decision in *Matter of Malpica-Orsini, supra.* That case also involved an unmarried father's objections to an adoption by the natural mother and stepfather (discussed *infra*). This court in dismissing the appeal in *Orsini* stated: "The appeal is dismissed

for want of a substantial federal question. Mr. Justice Brennan and Mr. Justice White would note probable jurisdiction and set the case for oral argument."

As appellees will establish, *infra,* the relative factual considerations which entered into the determination by the Surrogate in this case reveal a less fit and less concerned unmarried father than the unmarried father in *Orsini v. Blasi, supra;* indeed the proof reveals a parent on a par with the unmarried father in *Quilloin v. Walcott,* ___ U.S. ____, 98 S. Ct. 549, 54 L. Ed. 2d 631 (1978).

ISSUE INVOLVED

The issue involved is whether New York's statute (Domestic Relations Law §111) and New York's decisions construing that statute, unconstitutionally discriminate against unmarried fathers in violation of the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

Appellant and *amici curiae* (hereafter "appellants") define the issue as one involving the right of a married father to "veto" an adoption — a right denied to an unmarried father. We shall establish that under New York law there exists no right of veto at all — each, the married father and unmarried father has an equal right to "prevent" the adoption from being approved.

In an adoption by blood-strangers to the child, both married and unmarried fathers, by virtue of New York's modified "flicker of interest" rule which affords primacy to parenthood, wed or unwed, are given equal rights to prevent the adoption.

In an adoption by the natural mother and stepfather, primacy of parenthood is afforded neither married or unmarried fathers. However both have equal rights to establish that their on-going relationship with the child is such as to warrant denial of the petition for adoption in "the best interests of the child." In

short, while inequality appears facially present in the statute, it does not exist at all in its application.

ARGUMENT

It may be observed that very few adoptions are contested by anyone at all including fathers, married or unmarried.*

It appears that most unmarried fathers are unknown, unidentified, undetermined or unconcerned, in which case they are unlikely to prevail in any event; or if concerned, are not entirely adverse to being relieved of the burden of support or potential support.

In consequence, whatever body of law exists, involves the truly or marginally concerned, supportive and fit unmarried father. Such an unmarried father under New York's statute and decisions, will prevail to the same extent as a married father.

Under New York's governing statute and prevailing decisions to equate the term "consent" with the term "veto" as appellants do, is a distortion, unintended of course, of New York law.

I(a)

THE RELEVANT STATUTE; NEW YORK DOMESTIC RELATIONS LAW §111.

This is New York's present statutory provision governing "consents" to adoption.

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* No statistics are available. Surrogate Sobel informed us that of an average of 350 adoptions a year which trafficked through his court, less than 3% were contested. He could recall only four (4) contests by an unmarried father in the past 10 years all involving adoptions by the natural mother and stepfather.

"111. WHOSE CONSENT REQUIRED

1. Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

(a) Of the adoptive child, if over fourteen years of age, unless the judge or Surrogate in his discretion dispenses with such consent;

(b) Of the parents or surviving parent; whether adult or infant, of a child born in wedlock;

(c) Of the mother, whether adult or infant, of a child born out of wedlock;

(d) Of any person or authorized agency having lawful custody of the adoptive child.

2. The consent shall not be required of a parent or of any other person having custody of the child:

(a) who evinces an intent to forego his or her parental or custodial rights and obligations as manifested by his or her failure for a period of six months to visit the child and communicate with the child or person having legal custody of the child, although able to do so; or

(b) who has surrendered the child to an authorized agency under the provisions of section three hundred eighty-four of the social services law; or

(c) for whose child a guardian has been appointed under the provisions of section three

hundred eighty-four-b of the social services law; or

(d) who has been deprived of civil rights pursuant to the civil rights law and whose civil rights have not been restored; or

(e) who, by reason of mental illness or mental retardation, as defined in subdivision six of section three hundred eighty-four-b of the social services law, is presently and for the foreseeable future unable to provide proper care for the child. The determination as to whether a parent is mentally ill or mentally retarded shall be made in accordance with the criteria and procedures set forth in subdivision six of section three hundred eighty-four-b of the social services law.

3. Notice of the proposed adoption shall be given in such manner as the judge or Surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to any other parent whose consent to adoption may not be required pursuant to subdivision two, if the judge or Surrogate so orders. Notwithstanding any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child.

4. Where the adoptive child is over the age of eighteen years the consents specified in paragraphs (b) and (c) of subdivision one of this section shall not be required, and the judge or Surrogate in his discretion may direct that the

consent specified in paragraph (d) of subdivision one of this section shall not be required if in his opinion the best interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

5. An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required but the judge or Surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe.

6. For the purposes of paragraph (a) of subdivision two:

(a) In the absence of evidence to the contrary, the ability to visit and communicate with a child or person having custody of the child shall be presumed.

(b) Evidence of insubstantial or infrequent visits or communication by the parent or other person having custody of the child shall not, of itself, be sufficient as a matter of law to preclude a finding that the consent of such parent or person to the child's adoption shall not be required.

(c) The subjective intent of the parent or other person having custody of the child, whether expressed or otherwise, unsupported by evidence of acts specified in paragraph (a) of subdivision two manifesting such intent, shall not preclude a determination that the consent of such parent or

other person to the child's adoption shall not be required.

(d) Payment by a parent toward the support of the child of a fair and reasonable sum, according to the parent's means, shall be deemed a substantial communication by such parent with the child or person having legal custody of the child."

Before discussing the quoted statute and its practical application, we make some preliminary observations.

The Present Statute

The above quoted statute although enacted into law at the time of Surrogate Sobel's decision (August 3, 1976) did not become effective until the following January 1, 1977. The statute prior to its amendment is set forth in Appellant's Brief at pp. 5, 6. The "new" statute simply renumbers and reletters the provisions of the "old" statute. The only significant additions are the provisions of subdivision 6 which merely codify existing law by stating the conditions under which the "consent" of any person, including married fathers, may be dispensed with (hereafter "dispensing conditions").

These "dispensing conditions" were added upon the recommendation of the Temporary State Commission on Child Welfare after consultation with the Surrogate's and Family Court Associations as part of a general recodification of laws applicable to child welfare (see L. of 1976, cc. 665, 666, 667, 668, 669). Chapter 665, in compliance with *Stanley v. Illinois* (405 U.S. 645) mandated notice to putative fathers.

Notice

In this case, there is no issue of notice. Appellant was given notice and a three day hearing. We only briefly mention, that

prior to *Stanley v. Illinois* [405 U.S. 645 (1962)] it was the invariable practice of the New York courts to give notice and opportunity to be heard to all unmarried fathers whose identity or whereabouts could be ascertained. After *Stanley*, such notice was given even to the extent of directing publication. Chapter 665 of the Laws of 1976 added Domestic Relations Law §111-a and Social Services Law §384-c both of which mandated notice to every unmarried father in any kind of proceeding leading to adoption.

Dispensing Conditions

Subdivision 1(b) of the New York Domestic Relations Law, §111, requires the "consent" of a married father.

Subdivision 2(a) defines the conditions under which his "consent" may be dispensed with.

Subdivision 6, the "dispensing conditions" merely codifies former decisions under which such "consent" may be dispensed with. We briefly observe and comment on these "dispensing conditions".

(a) Ability of the father to visit and communicate with his child is presumed. In the absence of proof of visitation and communication or that such visitation or communication was discouraged, "consent" will be dispensed with.

(b) Evidence of insubstantial or infrequent visitation or communication is sufficient as a matter of law to dispense with consent.

(c) Mere expressions of interest and concern for the child unsupported by affirmative evidence of such conduct, justifies dispensing with consent.

(d) Evidence of only intermittent or spasmodic financiai support, or none at all, justifies a court in dispensing with consent.

As noted, these four "dispensing conditions", each sufficient of itself, represents the accumulated experience and decisions of the courts in dispensing with consent.

When a petition for adoption, whether by blood-strangers or by natural mother and stepfather is presented to the court, it must either be accompanied by the married father's consent or must allege one or more of the "dispensing conditions". This is a "jurisdictional" requirement.

Under the relevant statute, experience of the courts at adoption hearings establishes that the "dispensing conditions" are invariably present. This is so simply because hearings on adoptions, whether by blood-strangers or by the natural mother and stepfather, are not scheduled until the adoptive child has been with the adoptive parents for a considerable period of time sufficient to establish the fitness of the adoptive family unit or the solidity and durability of the "new" marriage. However "concerned" the objecting father may be for his child, he rarely maintains the frequency of visitation and communication or the substantial support required by the dispensing conditions.

With regard to the married father, the hearing is simply a two step procedure, first dispensing with consent and next moving on to the determination of "the best interests of the child."

It is in the above sense that the statutory requirement of the "consent" of a married father simply cannot be equated with a "veto" power. If there is a truly concerned and supportive married father, the adoption proceeding will generally never be commenced at all. If one is commenced, the proceeding will ordinarily be disposed of in the first step by the court refusing to dispense with his consent since in any event, he would prevail in

the second step. This is not a power to "veto" — it is a substantive determination that adoption is not in "the best interests of the child."

The great majority of cases however involve only the "marginally" concerned and supportive married father or one who professes to be so concerned. In such a case, the court will as a first step, dispense with his consent under the "dispensing conditions" and move on to the substantive determination of "the best interest of the child." The married father has no power of "veto".

We repeat, neither by the implicit terms of the statute or in its practical operation, does a married father exercise an absolute power to "veto" an adoption. In every case where the married father prevails to prevent the adoption, there will have been an express substantive determination that the adoption is not in "the best interests of the child."

In the case of an unmarried father, whether the adoption is by blood-strangers or by the natural mother and stepfather, the petition under the relevant statute need not annex the unmarried father's "consent" or allege the existence of the "dispensing conditions".

In the practical operation of the statute the omissions of the "consent" and the allegations of the "dispensing conditions" in the petition are merely omissions of jurisdictional predicates. The hearing instead of being a two step proceeding as in the case of a married father becomes a one step proceeding. The court proceeds immediately to the determination of the substantive issue of "the best interests of the child."

It is a misconstruction of the relevant statute to contend, as do all the appellant's briefs, that the unmarried father does not have a "veto" power over the adoption. Under New York law, the unmarried and married father have precisely equal rights to

prevent the adoption, or as appellants say it, to "veto" the adoption, in the court's determination of the substantive issue of "the best interests of the child."

We establish this contention in our discussion next of the New York standard of "the best interests of the child."

I(b)

UNDER THE NEW YORK STANDARD OF THE BEST INTERESTS OF THE CHILD, THE RIGHTS OF MARRIED AND UNMARRIED FATHERS TO PREVENT ADOPTION ARE PRECISELY EQUAL.

Both the married father and the unmarried father have precisely the same substantive rights under the New York decisions applicable to "the best interests of the child" to prevent (or as appellants say it, to "veto") the adoption of their children.

We emphasize that such substantive rights to prevent the adoption exist irrespective of the presence or absence of the "dispensing conditions". These dispensing factors — that he may not have visited or supported the child to the minimal extent justifying dispensing with "consent" — do not deprive either the married father or the unmarried father of his substantive right to prevent the adoption "in the best interests of the child". The degree of his lack of concern are of course considerations in the determination of that substantive issue, but such considerations apply equally to the married and unmarried father.

In short under "the best interests of the child" standard there is no presumption whatsoever that the unmarried father is "unfit" and that the married father is "fit".

We discuss the application of the New York standard in the context of the nature of the adoption proceeding — those by blood-strangers to the child and those by the natural mother and stepfather.

Rights of Biological Fathers vs. Blood-Strangers

The decisions of the New York courts afford full consideration to the primacy of the father's biological parenthood where the adoptive parents are blood-strangers to the child. Indeed, absent evidence of substantive considerations detrimental to the best interests of the child, controlling consideration is given to the father's biological parenthood.

This, Surrogate Sobel observed in the instant case:

> "When the proposed adoptive parents are both blood strangers to the adoptive child and the objecting putative father is himself proposing to adopt, then a modified 'flicker of interest rule' will be applied" (A27).

The New York "flicker of interest" rule gave absolute primacy of right to a biological father, married or unmarried, who had not been proved to have "abandoned" the child. "Abandonment" could be made out "from a settled purpose to be rid of all parental obligations and to forego all parental rights" (*Matter of Maxwell*, 4 N.Y. 2d 429, 433; *see also Spence-Chapin Adoption Services v. Polk*, 29 N.Y. 2d 196; *Matter of Susan "W" v. Talbot "G"*, 34 N.Y. 2d 76).

The modified "flicker of interest" rule, to which Surrogate Sobel referred in his above quoted opinion, is the result of recent statutory and decisional changes in the applicable rule. It wisely permits considerations of factors of both married or unmarried fathers which may be detrimental to "the best interests of the child."

The modified rule, as was the former rule, is applied to both custody and adoption cases. It is best expressed in a recent decision by Chief Judge Breitel in a custody case, *Matter of*

Bennett v. Jeffreys, [40 N.Y. 2d 546 (1976)]. The reference to "parent" is to any biological parent, married or unmarried.

> "The parent has a 'right' to rear its child, and the child has a 'right' to be reared by its parent. However, there are exceptions created by extraordinary circumstances, illustratively, surrender, abandonment, persisting neglect, unfitness, an unfortunate or involuntary disruption of custody over an extended period of time. It is these exceptions which have engendered confusion, sometimes in thought but most often only in language.
>
> The day is long past in this State, if it had ever been, when the right of a parent to the custody of his or her child, where the extraordinary circumstances are present, would be enforced inexorably, contrary to the best interest of the child, on the theory solely of an absolute legal right. Instead, in the extraordinary circumstance, when there is a conflict, the best interest of the child has always been regarded as superior to the right of parental custody. Indeed, analysis of the cases reveals a shifting of emphasis rather than a remaking of substance. This shifting reflects more the modern principle that a child is a person, and not a sub-person over whom the parent has an absolute possessory interest. A child has rights too, some of which are of a constitutional magnitude (cf. *Goss v. Lopez*, 419 US 565, 574; *Matter of Winship*, 397 US 358, 365; *Tinker v. Des Moines School Dist.*, 393 US 503, 506; *Matter of Gault*, 387 US 1, 47).

* * *

> But neither decisional rule nor statute can displace a fit parent because someone else could do a 'better Job' of raising the child in the view of the court (or the Legislature), so long as the parent or parents have not forfeited their 'rights' by surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance. These 'rights' are not so much 'rights', but responsibilities which reflect the view, noted earlier, that, except when disqualified or displaced by extraordinary circumstances, parents are generally best qualified to care for their own children and therefore entitled to do so." (*Matter of Spence-Chapin Adoption Serv. v. Polk*, 29 N.Y. 2d 196, 204, *supra*).

Despite the existence of some of the "extraordinary circumstances" in this case, (discussed *infra*) if the contest had been between appellant Abdiel Caban and blood-strangers to his children, there is little doubt that his cross petition to himself adopt, would have been granted. Surrogate Sobel so hinted in his decision.

Under the modified "flicker of interest" rule, absent the "extraordinary circumstances", appellant Abdiel Caban as an unmarried biological father would be afforded precisely equal rights to prevent the adoption as if he were a married father. The primacy of parenthood of both biological fathers would afford both controlling consideration.

In a proceeding for adoption of their children by blood-strangers, there is simply no "inequality" under the relevant statute as construed by the New York decision.

Rights of Biological Father vs. Natural Mother and Stepfather

A first and prime observation is that when a biological father, married or unmarried, opposes an adoption by the

natural mother and stepfather, there exists no issue of primacy of parenthood. The contest is between parent versus parent. Nevertheless, precisely the same considerations enter into the determination of "the best interests of the child" whether the contestant is the married father or the unmarried father. The character, fitness and demonstrated concern of the biological father, whether married or unmarried, are of course, considerations but to be measured against the character, fitness and demonstrated concern of the natural mother and stepfather within the "new" family unit.

Whether the biological father merely seeks to prevent the adoption or cross-proposes to himself adopt, the "rights" of both married fathers and unmarried fathers are precisely equal. There exists no presumption of "unfitness" of either parent. Under New York law the standard of "the best interests of the child" govern the determination of the courts.

We cannot demonstrate by a host of decisions that such equality of consideration exists. For one reason, as heretofore discussed, unmarried fathers do not often oppose adoptions by the natural mother and stepfather. For another reason as this Court suggested in *Stanley v. Illinois,* (*supra,* 405 U.S. at 654) "it may be. . . that most unmarried fathers are unsuitable and neglectful parents" (Stanley was not such a parent but we shall demonstrate in this brief *infra,* that Abdiel Caban was not a suitable parent).

However, one such case, in which the contesting unmarried father was demonstrated to be a suitable and concerned parent, was recently decided by the Appellate Division, Second Department, the very same court which disposed of Abdiel Caban's similar contentions in a brief memorandum. In *Matter of Gerald G.G.* (61 A.D. 2d 521, 403 N.Y.S. 2d 57) that court dismissed a petition for adoption by the natural mother and stepfather upon the objection of a concerned unmarried father, observing:

> "This factual background clearly indicates that the appellant was, at all times, a devoted and concerned parent. In this respect, his conduct stands in stark contrast to that of the father of the child born out of wedlock of *Matter of Malpica-Orsini.* In that case the Court of Appeals rejected a constitutional attack on section 111-a of the Domestic Relations Law by the natural father of a child born out of wedlock and, at the same time, affirmed an order of adoption of that child by the natural mother and the spouse to whom she had recently been wed. In so doing, the court took pains to point out that the record indicated that the natural father had defaulted in mandatory support payments, that he was given to 'violent rages', that he 'tore a telephone off the wall, that he ripped all the electric wires out of the mother's car and threatened to take the child and disappear so the mother could never see her' (*Matter of Malpica-Orsini,* 36 N.Y. 2d 568, 577)."

That decision is a direct and unequivocal refutation of the appellant's contention that an unmarried father does not have the right under New York law to prevent an adoption of his child by either the natural mother and stepfather or by blood-strangers. As the court observed, it is the total "factual background" of the contesting and adopting parties which court must consider in determining "the best interests of the child." In that respect, given the same "factual background," no inequality exists as respects the rights of married fathers versus unmarried fathers and no presumption exists that the former is fit and the latter unfit. The facts of each case, as the decisions of this Court plainly establish, are determinative (*cf. Stanley v. Illinois, supra,* 405 U.S. 645 *with Quilloin v. Walcott,* ____ U.S. ____, 98 S. Ct. 549, 54 L. Ed. 2d 511).

While the New York standard of "the best interests of the child" does not discriminate between married and unmarried fathers, that standard is applied quite differently when the adoption is by blood-strangers and when the natural mother and stepfather seek to adopt her child.

For example, in a contest between a biological parent and blood-strangers, New York has held that factors such as superior economic, educational or social advantages, or comparisons of the degree of love and affection, do not enter into the consideration of "the best interests of the child." *(Matter of Bennett v. Jeffreys, supra,* 40 N.Y. 2d 543, 549; *Spence-Chapin Adoption Services v. Polk, supra,* 29 N.Y. 2d 196, 201). These become important relative considerations in a contest between parent and parent, even when the biological father does not seek custody or adoption, but merely seeks to prevent the adoption. *(Matter of Gerald G.G., supra,* 61 A.D. 2d 521, 403 N.Y.S. 2d 57).

A whole bundle of "rights" must be considered by the courts, including the rights of the biological father, in determining "the best interests of the child."

The natural mother has the "right" to rear her child within her new family unit together with her children of her new marriage. The adopting stepfather has rights flowing from his marriage to the natural mother, who has custody of the child. He has the obligation to give paternal care and guidance to the child as a consequence of such custody. He also has the obligation of support — in this case as in most, without assistance from the contesting father. In the case of an unmarried contesting father, the stepfather has an understandable repugnance to the intrusion into his life of his wife's former paramour.

This Court should not, as the appellant's briefs suggest on alleged constitutional inequality, dismiss the "rights" of the

natural mother and stepfather as though they were unrelated strangers having neither rights or obligations toward the child.

The adoptive child has "rights" too! Primary among these is the right to be raised within a single family unit with other children of the new family and without distinction among them, at home or in school.

Also, as the Surrogate mentioned in his decision in this case since the contesting father cannot hope to receive custody or himself adopt, the adoptive child has a right not to be left "in limbo" status. Surely this Court may not ignore the practical experience of all courts with children torn between two families and two fathers. Existing antagonisms are multiplied by new antagonisms from shared visitation and the concomitant shared obligation to support — if support is available from the contesting father. (It was not in the instant case!) It is observed in the latter regard that often a denial of a petition for adoption, if conditioned by an order for support by the contesting father, will result in his "consent" to the adoption.

As discussed, a bundle of rights enter into the determination of "the best interests of the child" when an adoption by the natural mother and stepfather is opposed by the biological father married (divorced) or unmarried.

No court, at least in New York, has spelled out all the considerations which enter into the determination of "the best interests of the child" in a parent vs. parent contest. We suggest a few:

The love, affection and other emotional ties existing between the competing parents and the child;

The relative future capacities of the competing parents to give the child parental guidance and education;

The relative capacities of the competing parents to supply the child with material needs including medical and educational needs (in this regard, as in this case, a court is required to give consideration to the respective earning capacities, home atmosphere and the number of other dependents of the competing parents);

The length of time the child has lived with one parent and been separated from the other parent;

The solidity and permanence of the competing family units;

The existing home, school and community record and associations of the child;

The age of the child and the reasonable preferences, if any, of the child between the competing parents;

The potential psychological effect upon the child of alternative decisions;

The relative character, fitness and concern for the child of the competing parents.

We turn next to the consideration of these and other factors which entered into the Surrogate's determination to grant the petition of the mother and stepfather of these children in this case. We observe that the evidence of appellant's character, fitness and concern for his two children, does not match in any substantial degree, his description in appellant's briefs as a fit and concerned parent. This "fudging" of the record, however well-intentioned to obtain a precedental ruling on an important constitutional issue from this Court, should not result in overruling a totally justified factual determination by the New York courts.

I(c)

COUNTER-STATEMENT OF FACT

In 1968 Maria Mohammed, just 18 years old and Abdiel Caban, then 31 years old, entered an out-of-wedlock relationship (R72, 73).

Caban was not divorced from Gloria, his wife, senior to him by eight years. Gloria, whom he had married on December 3rd, 1955, bore him two children Brenda and Janet (R384). At the time of the hearings before the Surrogate's Court of Kings County, State of New York, held on March 19th, 22nd and April 30th of 1976, Brenda was twenty years old; Janet sixteen years old and Caban was the grandfather of Brenda's child, Karen (R385).

Caban left his wife Gloria in 1960 (R388). In answer to the question: "Did you abandon Gloria or did she abandon you?", Caban admitted that he left his wife (R390). When he left his wife Gloria and the two children, Brenda and Janet, obviously then mere infants, Caban had no "special arrangement" with his lawful wife to support her or his children (R390). He made no effort to support his wife; he didn't know whether Gloria was working and he didn't care (R393). Eight years after he left his wife, Caban took up with the eighteen year old Maria (R389).

There is no affirmative evidence on the record that when Caban left his wife and infant children he furnished them with support. However, it was Mrs. Mohammed's testimony that she knew he was married, the father of children and that he did not support them (R77). She further testified that Caban told her that Gloria, his wife, had taken him to Family Court (R78) a circumstance which the appellant denied, claiming no "special arrangement" required him to support Brenda and Janet (R390). Caban's lack of sensitivity or responsibility for his wife patent on the record (R393), undoubtedly influenced the court's decision.

Maria Mohammed gave birth to David Andrew on July 16th, 1969 at the New York Infirmary; Caban did not pay the hospital bill, Maria did. Caban was not present; Maria listed him as the child's father without his assent (R74, R122).

Denise was born on March 12th, 1971 (R78, R82). Caban went to the hospital with the mother but since they were not married and his "coverage" was not useable, Caban "didn't say anything"; he simply left the hospital premises; the mother gave birth under her maiden name. Caban did not pay for the second child's birth as he did not for David Andrew (R82-84).

Three months later as the result of Maria's insistence, Caban allowed himself to be recorded as Denise's father (R85). Counsel for the appellant stipulated on the record that Caban never formally, in any court proceeding, ever acknowledged paternity of David Andrew or Denise (R74, 75).

Maria Mohammed, except for three months after Denise's birth and despite the infancy of the children, was fully employed (R75, 79); three months after Denise's birth, Maria returned to work and she, not Caban resumed her burden to pay all the household bills, rent, gas, electricity; she provided clothing, even the crib or bed for the child/children (R88). Caban gave her no money for rent, utilities or clothing (R88, 89). A family care center provided a babysitter so that Maria could continue working (R93). Mr. Caban's sole contribution was thirty ($30) dollars a week for food for the four persons. Maria prepared his meals as well (R76, 77). The first year of their affair was free of discord; but after that, for the balance of four years, the relationship was unhappy (R179, 180). For the final six months Caban beat her without reason; subjected her to name calling (bitch/fuck); he paid no attention to the children; no longer even bought food (R190).

Maria did not claim that Caban was cruel to the children; there were times when he was affectionate toward them. But he

never spent time with them, took them to the park or any other place. He was nice to them while underfoot (R90, 180).

Although she asked him, Caban never gave Maria any money, instead he would "borrow" from her which he never returned (R193). She was afraid of Caban; he beat her; he was a drunkard and always drinking (R189, 190). In answer to the appellant's counsel's question, ". . .why did you continue to live with him for four years in addition?!", Mrs. Mohammed declared that she felt strapped (trapped?!); that she couldn't really go anywhere (R194) until she met Kazim Mohammed in August of 1973, who knew of her children and who made a home for her and the children in December of 1973 (R93). He married Maria on January 30th, 1974 and fathered a child by her, Stephan Kazim Mohammed, born on December 17th, 1975 (R109). Maria did not tell Caban of the marriage. She feared that he would make trouble for her and her husband. Caban knew at all times where she was employed. He phoned her there frequently, notably to pay bills for the apartment where he continued to reside (R97, 98, 102, 399).

During the greater part of their relationship Maria and Caban lived one floor below her mother's apartment (R72, 198, 199). Maria's mother saw the children every weekend; Maria would bring the children to her or the grandmother would pick them up at Maria's home (R200, 201).

Because Caban continued to occupy the apartment one flight below the home of Maria's mother (R419), he continued to see the children who visited with her each weekend (A28; R201). The appellant contended that Maria brought the children to his home, personally delivered them most of the time and on Sunday following would pick them up either at his, or her mother's home (R411, 412). Earlier, however, Mr. Caban testified that he never had contact with Mrs. Mohammed (Maria) between the time she left him with the children and October of 1974 except by occasional telephone calls to her

office (R399). Caban's allegations that he saw the children each weekend for six months were truly convenient; without the burden of support he need only walk a few steps to do so. At any rate, between January and September of 1974 when he alleged that he saw the children each weekend for six months (A28; R99, 345-350) he never inquired of their mother or grandmother whether the children needed financial help; nor did he ever give them a gift (R203, 204).

Early in September of 1974 the grandmother, Delores Gonzalez planned to return to Puerto Rico; Maria, Kazim and she agreed that the children would leave with her; that Maria and Kazim, who planned to make their permanent home in Puerto Rico in the future, would remain behind until they earned sufficient money to join the children and establish their permanent home (R101, 104, 207).

Before she left for Puerto Rico on September 7th, 1974 the grandmother informed Caban of their plans. He was neither angry or upset. He offered no objections (R212, 213).

While the children remained with their grandmother in Puerto Rico (September, 1974 through November, 1975) Maria and Kazim alone supported the children by sending bi-weekly sums, visited the children in May of 1975 and regularly communicated with them by mail or telephone (R104, 105, 207, 212).

Caban neither communicated with the children or sent them any funds though he knew where they lived near his own parents (R211, 212).

The appellant denied that he was told the children had left for Puerto Rico until he learned in October of 1974 from his own parents, that they were there. Even if true, (although he testified at an earlier time that Maria told him so at the end of June or early July of 1974) the fact remains that from October,

1974 to November, 1975 Caban neither communicated with the children or sent any funds, however small, for their support (R211, 212). Maria testified that although he telephoned her at her place of employment, he never once inquired as to the children's welfare (R413-415).

During this period and quite expeditiously Caban obtained a divorce in June of 1974. He met his present wife Nina Caban in July of 1975 (R402) and took up residence with her and her two children. On December 16, 1975 he married Nina (R403) and they and her two children took up residence in a three room apartment (R436). At this stage Caban had fathered four children and assumed obligation with regard to two others of his wife.

Caban consulted his attorney sometime during September or October 1975 and told him about the children. In November 1975, some eighteen months after he had last seen or talked with the children, he went to Puerto Rico (R420). While there he caused his mother, under a pretext, to invite the children to his parents' home. On Friday November 14th, 1975 without leave from the maternal grandmother, he "snatched" (the Surrogate's own words) from their grandmother and absconded with them to his present wife, Nina's home. He was not yet married to Nina.

Caban left not an address, but only a telephone number with his own mother. His mother gave the phone number to Maria's mother who promptly phoned Maria and Kazim in New York (R219).

The next day Maria applied to the Family Court for assistance. She was informed that the court was helpless unless she could supply an address for the children. She obtained such an address from the business office of the telephone company. On November 24th, 1975 she found the children in the custody of Nina, a total stranger to the children. After a street quarrel and a ruse described by the Surrogate:

> "Their attempts with the aid of police to regain custody was frustrated again by the removal of the children to a new address. A proceeding in the Family Court resulted in temporary custody being awarded to the mother. The hearings have been adjourned pending the outcome of these adoption proceedings" (A29).

Upon this brief statement of the facts, it is obvious that if the relevant statute (DRL §111) had provided for the "consent" of the unmarried father, the court would have dispensed with the consent of appellant Abdiel Caban under the "dispensing conditions" of subdivision 6 of that statute — and been entirely justified in so doing.

Indeed on the basis of such facts it is obvious that the Surrogate was suspicious of the motives of appellant in opposing the adoption —

> "However quite a different situation is presented when the putative father opposes the adoption by the stepfather, married to the natural mother having custody of the child. A putative father opposing such an adoption, without the consent of the natural mother has himself no prospect of adopting the child. His motive in opposing the adoption is therefore an important consideration. As this court has noted, too often the continued interest is not in the child but rather in the natural mother and whether such interest is labelled 'love' or 'hatred' — it really makes little difference — the purpose is to preserve in some manner, however oblique, the dissolved former relationship. Motive is however very difficult for a court to discern for often the objecting father is not himself consciously aware of it" (Appellant's Appendix, pp. 27, 28).

The Surrogate, confronted with an unmarried father who had fathered four children and now on a modest salary had undertaken the obligation to support a new wife and her two infant children, and with a father who had been only marginally concerned when convenient but totally unsupportive to the adoptive children — moved directly to the determination of "the best interests of the children". He found the marriage of the natural mother to the stepfather to be "solid and permanent" and the children "well cared for and healthy".

Children are not self-supporting. Their survival depends on parents. The Surrogate found that these children's "best interests" required granting the adoption and dismissing the objection of the unmarried father. However the appellant's briefs distort the character, fitness and concern of this unmarried father, the Surrogate in approving the adoption, justifiably found him unfit, unconcerned and unsupportive.

No different result could have followed if the "consent" of this unmarried father was required by the relevant statute, or indeed if he had been a married (divorced) father.

II.

STANLEY V. ILLINOIS IS TOTALLY IRRELEVANT TO THE ISSUES IN THIS CASE.

A first and prime observation is that *Stanley v. Illinois* (405 U.S. 645) involved a contest over custody of his children by an unmarried father, who had lived with and supported his children during a period of 18 years. The protagonists were the Father vs. the State.

Not involved were the rights of an unmarried father to prevent an adoption by blood-strangers to the child.

Not involved, as in the instant case, were the rights of an unmarried father to prevent an adoption by the natural mother

and stepfather of his children. In *Stanley*, the mother was deceased.

Nor, we observe, unlike *Stanley*, is there any issue of procedural due process raised in this case. Under the relevant statute (DRL §111) set forth in full at pages 5, 6 of Appellant's Brief, the Surrogate had discretion to order "notice" to Caban which he did. It is not contested that Caban was given a full and complete three day hearing by the court. *Stanley* was offered neither "notice" nor a "hearing".

Nor, we contend, is there any issue in this case of substantive due process.

This Court, after examining *Stanley* found that "Illinois law affords him no priority in adoption proceedings" and that it was made to appear "that Stanley, unmarried and impecunious, as he is, could not now expect to profit from adoption proceedings."

We repeat, the New York courts have afforded, except in "extraordinary circumstances", controlling consideration to the primacy of biological parenthood both in custody and adoption proceedings. The latest expression of that principle is in *Matter of Bennett v. Jeffreys, supra*, 40 N.Y. 2d 543, 548, 549:

> "But neither decisional rule nor statute can displace a fit parent because someone else could do a 'better job' of raising the child in the view of the court (or the Legislature), so long as the parent or parents have not forfeited their 'rights' by surrender, abandonment, unfitness, persisting neglect or other extraordinary circumstance. These 'rights' are not so much 'rights', but responsibilities which reflect the view, noted earlier, that, except when disqualified or displaced by extraordinary circumstances,

parents are generally best qualified to care for their own children and therefore entitled to do so (*Matter of Spence-Chapin Adoption Serv. v. Polk*, 29 N Y 2d 196, 204, supra).

Indeed, as said earlier, the courts and the law would, under existing constitutional principles, be powerless to supplant parents except for grievous cause or necessity (see *Stanley v. Illinois*, 405 U S 645, 651, supra, in which the principle is plainly stated and stressed as more significant than other essential constitutional rights).

But where there is warrant to consider displacement of the parent, a determination that extraordinary circumstances exist is only the beginning, not the end, of judicial inquiry. Extraordinary circumstances alone do not justify depriving a natural parent of the custody of a child. Instead, once extraordinary circumstances are found, the court must then make the disposition that is in the best interest of the child.

* * *

The child's 'best interest' is not controlled by whether the natural parent or the nonparent would make a 'better' parent, or by whether the parent or the nonparent would afford the child a 'better' background or superior creature comforts. Nor is the child's best interest controlled alone by comparing the depth of love and affection between the child and those who vie for its custody. Instead, in ascertaining the child's best interest, the court is guided by principles which reflect a 'considered social

judgment in this society respecting the family and parenthood'. (*Matter of Spence-Chapin Adoption Serv. v. Polk*, 29 N Y 2d 196, 204, supra)."

As the court above noted, the fact that the relevant statute (DRL §111) does not require, as a condition precedent, the "consent" of an unmarried father, "is only the beginning not the end of the judicial inquiry." Extraordinary circumstances (like the "dispensing conditions"), *supra*, alone do not justify denying a natural parent of the custody of a child. Instead once extraordinary circumstances (like "dispensing conditions") are found, the court must then make the disposition that it is in "the best interests of the child."

Unlike Illinois law, under New York law there is no presumption, express or implied that an unmarried father is unfit. Indeed, like a married father, "impecunious" or not, the presumption is the other way.

Under New York law, Stanley would be awarded custody of his children as a matter of law.

Under New York law, despite the fact that his "consent" to an adoption by blood-strangers would not be required, since "extraordinary circumstances" were not proved to exist Stanley could prevent (or as appellant's briefs put it "veto") such an adoption. Stanley would not have to establish that "he was the most suitable of all" (405 U.S. at 648); he would be afforded priority as a biological parent.

Stanley's wife predeceased the commencement of the proceeding. But if she were living and married and sought to adopt the children, the New York courts would afford Stanley notice and a hearing and would proceed to balance the countervailing interests under the standard of the "best interests" of the children. *Matter of Gerald G.G., supra*, 61 A.D. 2d 521, 403 N.Y.S. 2d 57.

Since under New York law, Stanley would not be denied procedural or substantive due process, he would not be denied the equal protection of the laws guaranteed by the Fourteenth Amendment (405 U.S. at 658, Mr. Justice Douglas not joining in this part of the opinion; Chief Justice Burger and Mr. Justice Blackman dissenting).

We turn to brief mention of Stanley's progeny some of which are cited in appellant's briefs.

Miller v. Miller [504 F.2d 1067 (1974)] was a situation where the natural mother surrendered the child to blood-strangers without notice or consent of the biological father. The court declared the Oregon statute unconstitutional. New York's statutes in the same circumstances, provide for notice and a hearing and absent "extraordinary circumstances", affords priority to the biological father.

People ex rel. Slawek v. Covenant Childrens Home (52 Ill. 2d 20, 284 N.E. 2d 291) concerned an adoption by blood-strangers, with the consent of the natural mother but without notice to the unmarried father. The court directed a hearing upon notice with proper regard to the length of time the child had been with the adoptive parents. Under New York law, the unmarried father would be afforded both notice and a hearing.

Vanderlaan v. Vanderlaan [126 Ill. App. 2d 410, 262 N.E. 2d 87, *vacated and remanded*, 405 U.S. 1051, *rehearing held*, 9 Ill. App. 3d 260, 292 N.E. 2d 145 (1972)] involved a factual situation where the unmarried mother voluntarily surrendered custody to the unmarried father and then demanded a change of custody to herself. On remand from the court, the Illinois court held that an unmarried father is entitled to custody equally with the unmarried mother. New York's Domestic Relations Law §70 provides "In all cases there shall be no prima facie right to the custody of the child in either parent but the court shall determine solely what is for the best interest of the child — and make the award accordingly."

Rothstein v. Lutheran Social Services of Wisconsin (47 Wis. 2d 420, 178 N.W. 2d 56, *vacated and remanded,* 405 U.S. 1051, *on remand,* 59 Wis. 2d 1, 207 N.W. 2d 826) merely decided that an unmarried father's children could not be adopted by blood-strangers without notice and affording him a hearing. On remand the court ordered — "Consent of both the unwed mother and the unwed father or consent of one with the proper termination of the parental rights of the other is necessary." This is precisely what New York law affords both an unmarried and married father. In addition, absent extraordinary circumstances, the unmarried biological father would be afforded priority.

The case of *Adoption of Rebecca B* (68 C.A. 2d 137, 137 Cal. Reptr. 100) is strikingly similar to the instant case. The unmarried father's two children had been adopted by their natural mother and stepfather without notice or hearing to the unmarried father. The unmarried father brought a proceeding to vacate the adoption.

The Appellate Court affirmed an order vacating the adoption on the sole ground that the unmarried father had been denied procedural due process citing *Stanley*. The court held however that in a natural mother and stepfather adoption neither substantive due process or equal protection of the law is denied to the unmarried father by requiring only the consent of the natural mother to such an adoption —

> "Accordingly, we hold that the balance of competing interests justifies the provision for stepparents adoption of an illegitimate child on the basis of the consent of the mother alone." (68 C.A. 3d at 199).

We turn to the consideration of *Matter of Malpica-Orsini, supra* (36 N.Y. 2d 568, 331 N.E. 2d 486, *appeal dismissed,* 423 U.S. 1042) a case strikingly similar to the matter at Bar.

III.

THE DECISION OF THIS COURT IN DISMISSING THE APPEAL IN *ORSINI V. BLASI* SHOULD BE A CONTROLLING PRECEDENT.

The appellees would most respectfully observe, before commenting on *Orsini, supra,* that contrary to the New York Court of Appeals' implied holding, the constitutional issue of due process or equal protection does not at all arise under the relevant statute (Domestic Relations Law §111).

True "consent" of a married father is required and not the "consent" of an unmarried father. But "consent" is only the beginning not the end of the judicial inquiry. Whether "consent" is required, or "consent" dispensed with (subd. 6 of §111) or no "consent" is required, the court in every instance must make a substantive judicial determination, of the "best interests of the child." The difference between married and unmarried fathers lies solely in the jurisdictional allegations of the petition. Both have equal rights to prevent an adoption "in the best interests of the child."

Matter of Malpica-Orsini (36 N.Y.2d 568, 331 N.E. 2d 486, *appeal dismissed sub. nom. Orsini v. Blasi,* 423 U.S. 1042 "for want of a substantial federal question") presented issues similar to those raised on the appeal.

The briefs in *Orsini* are not helpful — each distorts the facts. We garner the facts solely from the decision of the Court of Appeals.

The child in *Orsini* was born on November 16, 1970. Thereafter the unmarried father lived with the mother and the child until June 1972 when she left him. She applied for welfare. She was informed that she could not receive such assistance unless she commenced a paternity and support proceeding. In

such proceeding, the unmarried father acknowledged paternity and was ordered to support the child. The record establishes that support was furnished but to what extent is unclear.

In February 1973 the mother married. An adoption proceeding was commenced in the Family Court, Westchester County. The petition for adoption alleged serious defaults in payment of court-ordered support, violent rages and threats to kidnap the child (36 N.Y. 2d at 577).

We observe parenthetically that the allegations, if true, would warrant a court in dispensing with consent, if consent was required under the statute. We add to this observation that since this present appeal, a few courts have taken the affirmative first step of dispensing with consent of unmarried fathers as a purely precautionary measure [*see e.g., Matter of Benjamin,* ____ M.2d ____, 403 N.Y.S. 2d 877 (decided by the Surrogate of New York County, April 4, 1978)].

Upon presentation of the petition for adoption, the Family Court ordered notice to the unmarried father and scheduled a hearing. It is not clear whether such a hearing was had for the parties stipulated "if the parties were called to testify that the Court would have sufficient facts before it, other than abandonment or other waiver of rights by Mr. Orsini, to exercise its discretion to deny his objections and approve the adoption on the grounds that the overall best interest of the child would warrant it." (36 N.Y. 2d at 577). Presumably the stipulation was purposed to present the constitutional issue as a matter of law.

The Family Court granted the petition for adoption and dismissed the objection. An appeal was taken directly to the Court of Appeals on the constitutional issue.

Disregarding the factual background which may have justified the granting of the petition for adoption in "the best

interest of the child," the Court of Appeals moved directly to the constitutional issue.

That court used a "rational basis" standard although conceding that a stricter standard of judicial scrutiny might be applied. In this regard, we respectfully contend that if indeed there is any issue of equal protection, the least strict standard of scrutiny is required. That court (as well as this Court) was not concerned with the rights of illegitimates *per se* or *inter se* legitimate children. That court (as well as this Court) was not concerned with the stricter standards of scrutiny suggested in the *amici curiae* briefs [*Jiminez v. Weinberger,* 417 U.S. 628 (1974)]; *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973); *Weber v. Aetna,* 406 U.S. 164 (1972); *Levy v. Louisiana,* 319 U.S. 68 (1968)]. Such cases are distinguishable from cases which involve the rights of an unmarried father who, by preventing an adoption seeks only to continue his right of ongoing companionship and visitation with his child.

To sustain the validity of the statutory classification which required "consents" from the married father and unmarried mother but not the unmarried father, the Court of Appeals found (1) that great difficulty would be encountered in the overwhelming majority of cases in obtaining a "consent" from a putative father who is unknown, or from one who is unaware that he is the father or from one who disputes parentage or from one who is simply unconcerned; (2) that putative fathers would withhold their consent not out of concern for the child but out of animosity toward the mother; (3) that adoptive parents generally would be dissuaded from adopting out of fear of subsequent annoyance by the putative father; (4) that the difficulty and delay in obtaining approval of adoptions would increase trauma in the child; (5) that the resultant difficulty in obtaining consents would result in increased expense to authorized agencies and adoptive parents; (6) that black-marketing of children would increase, (7) that marriages would decrease from fear by stepfathers of perpetual annoyance from

the wife's former paramour and (8) that requiring consent from putative fathers would have the overall effect of denying homes to the homeless by impeding the worthy process of adoption. For all these reasons the Court of Appeals concluded —

> "Certainly these facts demonstrate that the classification is reasonable not arbitrary."

We omit comment on the reasons assigned by the Court of Appeals for its determination that the statutory classification is "reasonable not arbitrary", since we contend that both married fathers and unmarried fathers have equal rights under the relevant statute (DRL §111) to prevent an adoption of their children.

We illustrate this by reference to the dissent in the Court of Appeals in *Orsini*. The dissent suggested that the relevant statute would survive constitutional challenge if it provided for the "consent" of both married and unmarried fathers. Other courts with experience and responsibility in these matters have suggested that the requirement be revised "downward" to require the "consent" of neither (*Matter of Tyese*, 83 Misc. 2d 1044, 373 N.Y.S. 2d 447).

Concedely either suggested amendment, whether legislative or judicial, would be preferable to the present statute. But apart from obviating constitutional attack on alleged inequality, neither amendment would change the result in any case — particularly not in this case.

Under the present statute a father, married or unmarried, who has maintained a positive ongoing and supportive relationship with his child (hereafter "concerned father") is, and without doubt should be, allowed to prevent an adoption of his child whether by blood-strangers or the natural mother and stepfather. To deprive any child of the companionship and visitation of such a "concerned father" is *ipso facto* not in "the best interests of the child."

Under the present statute such a married "concerned father" may withhold his consent. At the hearing, the court would refuse to dispense with his consent thereby determining that the adoption is not in "the best interests of the child." This is in effect a two step proceeding under the "best interest" standard.

Under the present statute, an unmarried father's consent is not required. But if it is established at the hearing that he is a "concerned father", the court would necessarily determine that the adoption is not in the best interests of his child. This is in practical effect a single step procedure.

If the "consent" of both married and unmarried fathers was statutorily required, the proceedings would in all cases be a two step procedure. If the "consent" of neither was required, the proceedings in all cases would be a one step procedure

Where the father, married or unmarried, is not a "concerned father" the procedure would be no different under the present statute or under a statute requiring the consent of both or the consent of neither. Consent, if required, would be dispensed with under the "dispensing conditions" of the relevant statute [DRL §111 (subd. 6)]. The court would determine the "best interests of the child" under a two step procedure. If consent was not required of either the married or unmarried father, the court in a single step would determine "the best interests of the child."

The point we make is that the present statute does not discriminate between married fathers and unmarried fathers any more or less than would a statute requiring the "consent" of both or the "consent" of neither.

As we have discussed, the New York standard of "the best interests of the child" is applied differently if the adoption is by blood-strangers or by natural mother and stepfather — but without discrimination between married fathers and unmarried fathers in such application.

Although this Court did not articulate its reasons for dismissing the appeal in *Orsini v. Blasi* (423 U.S. 1042) "for want of a substantial federal question", we believe that this Court recognized that the New York statute (DRL §111) does not in fact or in law discriminate between married fathers and unmarried fathers.

We contend that this appeal raises no federal question at all. The decision and the orders of the Court of Appeals (*Matter of Adoption of David C. and Denise C.*, 43 N.Y. 2d 708) should be affirmed for the same reason the appeal in *Orsini v. Blasi, supra* [423 U.S. 1042 (1975)] was dismissed.

IV.

THE APPELLANT'S SUBSTANTIVE RIGHTS WERE NOT VIOLATED BY THE NEW YORK COURT'S APPLICATION OF A "BEST INTERESTS OF THE CHILD" STANDARD. THIS COURT SHOULD MAKE THE SAME DISPOSITION OF THIS APPEAL AS WAS MADE IN *QUILLOIN V. WALCOTT*.

The facts in *Quilloin v. Walcott* [____ U.S. ____, 54 L. Ed. 2d 511 (1978)] are similar to the facts in this case.

The Georgia statute in *Quilloin* provided for the consent of a married father but not the consent of an unmarried father [Ga. Code Cenn. §74-403 (subds. 1, 2)]. The consent of the married father could be dispensed with under the statute only upon proof of abandonment. Unlike the New York statute [DRL §111 (subd. 6)] the Georgia statute did not contain the "dispensing conditions" which permit the New York courts to dispense with "consent" upon proof of conditions far, far short of abandonment, for example, failure to maintain substantial and frequent visitation and communication and substantial support.

The adoption in *Quilloin* was by the natural mother and stepfather. Factually, the only distinction between *Quilloin* and

this case, was that Quilloin had not lived with the natural mother for any period of time.

This Court affirmed the Georgia courts. On the issue of substantive due process, this Court held:

> "We have little doubt that the Due Process Clause would be offended '(i)f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 . . . (1977) (Steward, J., concurring). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, was in the 'best interests of the child.'"

In deciding the substantive due process issue, this Court differentiated between an adoption by blood-strangers and an adoption by the natural mother and stepfather. This is a distinction which we have discussed in Part I(b) of this brief (New York Standard of Best Interests of the Child). We have contended further that though that standard is applied

differently where the contest is between parent vs. blood-strangers and parent vs. parent, both married and unmarried fathers are given equal rights to prevent any adoption.

On *Quilloin's* equal protection contention, this Court held:

> "Appellant contends that even if he is not entitled to prevail as a matter of due process principles of equal protection require that his authority to veto an adoption be measured by the same standard that would have been applied to a married father. In particular, appellant asserts that his interests are indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child, and therefore the State acted impermissibly in treating his case differently. We think appellant's interests are readily distinguishable from those of a divorced father, and accordingly believe that the State could permissibly give appellant *less veto* authority than it provides to a married father.
>
> Although appellant was subject, for the years prior to these proceedings, to essentially the same child support obligation as a married father would have had, compare 74-202 with 74-105 and 30-301, he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child. In contrast, legal custody of children is of course a central aspect of the marital relationships, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child."

We contend of course that New York's relevant statute does not give an unmarried father "less veto authority than it provides to a married father." Nevertheless Caban, except for the period when they lived together, "never shouldered any responsibility with respect to their daily supervision, education, protection or care and never supported the children. Indeed as the Surrogate impliedly recognized he was incapable of doing so even if he sought custody or adoption of his children. The New York courts found that the countervailing interests of the natural mother and her family unit so far overbalanced the alleged fitness, concern and character of Caban as to outweigh by far his professed interest and concern for his children. This was hard and meticulous fact-finding by an experienced judge acting under responsibility in these matters. The court would have reached the same conclusion if Caban were the married (divorced) father of these children.

We believe that *Quilloin v. Walcott* is indistinguishable from the present case. The judgment of the New York courts should be affirmed.

V.

UNDER THE NEW YORK STATUTE THERE IS NO DISCRIMINATION ON THE BASIS OF THE SEX OF THE PARENTS OF ILLEGITIMATE CHILDREN.

Under the relevant statute (DRL §111) there exists no discrimination on the basis of the sex of the parents of illegitimate children.

Such an issue does not even occur when all that an unmarried father seeks is to prevent (or "veto") an adoption — including an adoption by the unmarried mother and stepfather. The statute does not require the "consent" of the unmarried mother in bringing such a proceeding or to prevail in such a proceeding.

It is only when the unmarried father is himself (or with his wife) seeking to adopt his children that the statute requires the "consent" of the unmarried mother. In this case, in order to use the sex discrimination issue, appellant Abdiel Caban and his wife Nina (whom he had married December 16, 1975 during the pendency of the Family Court proceeding and only eleven weeks before his petition) cross petitioned for the adoption of the children (March 8, 1976).

True, for an unmarried father to adopt his children, the "consent" of the unmarried mother is required. But under the statute there is no irrebuttable presumption that the unmarried mother is a fit and concerned parent. For under the express terms of the statute the consent of any "parent" (including an unmarried mother) may be dispensed with under the "dispensing conditions" [DRL §111 (subds. 2(a), 6)] on far less proof than is required to establish abandonment. [*Cf. Matter of Corey L v. Martin L*, 55 A.D. 2d 717, 389 N.Y.S. 2d 428; *Matter of Shannon T*, 87 Misc. 2d 744, 386 N.Y.S. 2d 726 (both recent cases dispensing with "consent" of a married father)]. When a court dispenses with the consent of the unmarried mother, the standard becomes "the best interests of the child." Both the unmarried father and the unmarried mother have equal rights to prevail in their petitions to adopt the child.

It is true also that in a cross contest to adopt their children, the "consent" of the unmarried father is not the end but only the beginning of the judicial inquiry. Not alone may the unmarried father prevent the adoption (which is not the issue under discussion) but he may prevail in his petition for adoption if the

proof, from whatever source produced, establishes that the adoption by the unmarried father is in "the best interests of the child." The statute does not deny that right to the unmarried father, as appellants contend, — it, in law, grants that right to the same extent that it grants that right to the unmarried mother.

It is undoubtedly true that in cross contests for adoption between the unmarried mother and the unmarried father, the courts have invariably favored the unmarried mother. But this is not because of any presumptions in the statute or because of any provisions in the statute but instead simply because in such a contest the surrounding facts and circumstances invariably favor the unmarried mother (A30).

The unmarried mother has given birth to the child. Invariably the child will remain continuously in her custody. From such circumstance, there is rarely an issue of "insubstantial or infrequent visits or communication" [subd. 6(a)] to the extent that the unmarried father has not been fully supportative or not supportive at all, the unmarried mother has fulfilled her obligation to support the child [subd. 6(a)].

For these factual reasons (and not because of any provision of the statute) we cannot cite any decision in New York where the unmarried father has prevailed in a cross petition for adoption over the petition of the unmarried mother. But this is not, we repeat because of any presumptions or provisions of the statute.

For the foregoing reasons, we do not enter into any discussion or citations of this Court's decision dealing with sex or gender based discrimination. The decisions of the New York courts below did not discuss it. The Surrogate in his opinion disdained to give even mention to the cross petition of the Cabans' on the basis of the obvious unfitness of the cross petitioners' new and untested family unit to assume any additional obligations for these two adoptive children.

We respectfully contend that for the same reasons, this Court need not concern itself with any sex discrimination in this case. It did not in either *Stanley, Orsini* or *Quilloin, supra.*

CONCLUSION

For all of the foregoing reasons the judgment of the New York State Court of Appeals should be affirmed.

Respectfully submitted,

s/ Morris Schulslaper
Attorney for Appellees

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6431

ABDIEL CABAN,

Appellant,

v.

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

INTRODUCTION

The thrusts of appellees' brief are essentially four-fold: (1) Conceding appellant's own fitness to have adopted his children if they had not opposed it, they justify ousting him of all parental rights on the unfactual assumption that the paternal adoption is not by a "blood-stranger" and that the contest is like an intra-family custody dispute "between competing parents"; (2) based on the same false premise that the step-father is a blood relative of the children, a claim that the Court can ignore the constitutionally mandated first-stage proof of parental abandonment or unfitness, as well as the solid family relationship between appellant and his children, and go straight to the "best interest test"; (3) a

claim which is without any validity at all, that married and unmarried fathers in New York have equal rights under the statute and that appellant was not treated in any way different from a married father when his consent to the adoption was dispensed with; (4) a claim that the "fitness of the father" test is equivalent to the "best interest of the child" test in New York.

Of these major propositions, the first and second rest on the same falacious premise and lack legal merit, while the third and fourth were recently demolished by the New York Court of Appeals in *Matter of Corey L. v. Martin L.*, 45 N.Y.2d 383 (7/13/78)

The Attorney General's brief, after betraying a massive lack of knowledge of the record, has a double thrust: Reliance on *Matter of Malpica-Orsini,* 36 N.Y.2d 568 (1975), app.dis. *sub nom. Orisini v. Blasi,* 423 U.S. 1042 (1976); and without showing the similarity, an unreasoned equation of the facts at bar with those of *Quilloin v. Walcott,* ____ U.S. ____ , 54 L.Ed.2d 511 (1978), in order to gain the same result.

Both briefs go so far as to misstate the facts and involve statutes not even in effect when the adoptions were granted. In the end, when the dust has settled, only appellant's male gender and his lack of formal marriage ties to the female parent are left standing as the basis for the loss of his children. Appellant will endeavor here to clarify both facts and applicable law and to reply to appellees' and their friend's main contentions.

I.

THE ISSUES HERE CANNOT BE RESOLVED ON THE BASIS OF THE PERCENTAGE OF CONTESTED ADOPTIONS IN NEW YORK.

Appellees opened their argument with the observation that few unwed fathers oppose adoptions in New York (Appellees' Brief, 4 (hereafter referred to as "AEB")). This is different from saying that few unwed fathers care for their children. If it is true that there are few contests, the reasons may vary. Factors such as the natural reluctance on the part of most men to try wresting children away from their natural fathers to be substituted in their place may play its role. So too may the fact that some unwed fathers may be unidentified. The penalty of fatherhood unaccompanied by marriage to the mother which is exacted by §111 and deprives the unwed father of anything more than supportive standby status until an adoptive father comes along, surely discourages the development of a parent/child relationship which many fathers would then fight to protect. In any event, the fact of such a statute on the books deters legal contest, absent a willingness and determination to carry it all the way to this Court. There are in addition, of course, a host of agency sponsored non-adversary adoptions of truly abandoned and homeless children, unlike those here.

Certainly, the putative paucity of such contests does not justify taking appellant's children away from him. If it is the rule that most adoptions are consented to, the ones here are not.

II.

NOT AN APPLICATION OF THE "BEST INTEREST OF THE CHILD" TEST, BUT A PUNITIVE DISCRIMINATORY DENIAL OF PARENTAL RIGHTS TO APPELLANT BECAUSE OF HIS SEX AND UNWED STATUS IS THE BASIS BELOW OF THE ADOPTION OF HIS CHILDREN WITHOUT HIS CONSENT.

A. The Rights of Appellant were not Posited on his Children's Best Interest but Upon his Unwed Male Status.

Appellees appear to recognize that the statutory distinction between wed and unwed fathers' rights to protect their children from being taken away by adoption is not rationally justifiable. Therefore, they heavily rely in their brief upon the claim that "UNDER THE NEW YORK STANDARD OF THE BEST INTERESTS OF THE CHILD, THE RIGHTS OF MARRIED AND UNMARRIED FATHERS TO PREVENT ADOPTION ARE PRECISELY EQUAL." (AEB, 12) The Attorney General contends: "The State of New York has implemented an adoption process which operates smoothly and efficiently and has, as its primary beneficiary, the interest of the children at heart." (Attorney General's Brief, 21-22 (hereafter referred to as "AGB")).

Neither the appellees nor the Attorney General have correctly stated the New York law. In fact, it is quite the opposite. The rights of married and unmarried fathers are not equal and the New York law does not evenly apply the standard of the "best interest of the child" or have that interest as its "primary beneficiary." Both contentions are

disposed of by the New York high court in *Matter of Corey L.* The significance of that most recent interpretation of the New York adoption law's consent requirements, as they appear in §111, is that it illuminates the parameters of parental rights to withhold consent and veto adoptions and so highlights the extent to which they have been denied to appellant. Appellant will address the contentions made by appellees and the Attorney General in the light of that case.

Appellees have properly noted that adoption without parental consent is a two-stage process. The first step is to overcome lack of parental consent by showing facts which dispense with it. This is the predicate to the second step, which is to determine the best interest of the child. The sharp difference in the way mothers and married fathers are treated on the one hand and unwed fathers like appellant on the other in New York is manifest from the fact that the first stage is bypassed in the case of unmarried fathers — though appellees confess the first stage to be a "jurisdictional predicate".

> "In the practical operation of the statute the omissions of the 'consent' and the allegations of the 'dispensing conditions' in the petition are merely omissions of jurisdictional predicates. The hearing instead of being a two step proceeding as in the case of a married father becomes a one step proceeding. The court proceeds immediately to the determination of the substantive issue of 'the best interests of the child.' " (AEB,11)[1]

[1]In fact, appellees *did* allege a "dispensing condition", namely "abandonment" in both adoption petitions and in their citations. (A.4,6,7,9) They did not prove it, nor do they argue that they did in their brief. The citations required appellant to show cause why "a further order determining that Abdiel Caban has abandoned said minor child and dispensing with his consent to the adoption of said minor child by the petitioners" should not be made. But after they failed to prove his

(continued)

Appellees' contention made immediately afterward that "Under New York law, the unmarried and married father have precisely equal rights to prevent the adoption, or as appellants say it, to 'veto' the adoption, in the court's determination of the substantive issue of 'the best interests of the child.'" (AEB, 11-12) does more than brazenly contradict the admission just made concerning "the practical operation of the statute". It is also in a flat 180 degree collision course with the New York law as authoritatively expounded by its high court as recently as July 13, 1978 in *Corey L.*

Corey L. is an exemplar of Section 111 in action. There, a married father, with far fewer paternal connections with his child than appellant has in this case, refused to consent to his child's adoption by a stepfather. An effort was made to dispense with his consent by claiming "abandonment" of the child he had hardly seen and had totally not supported for several years, though he lived in the same neighborhood. The court held the stepfather to strict proof of the existence of the "statutory and constitutional" dispensing-with-consent conditions. It found that the proof did not meet the standards necessary to oust that married father of his important parental rights, and it dismissed the adoption petition in an Opinion per Cooke, J. (who also authored *Malpica-Orsini*).

A clearer example of the wide gap existing in New York between married and unmarried fathers cannot be found than in comparison of *Corey L.* for married ones with *Malpica-Orsini* and the opinions below for those not wed.

(footnote continued from preceding page)
abandonment, appellees have understandably reversed track and downplayed their original agreement that there could be no adoption without appellant's consent, unless a "dispensing condition" was alleged and demonstrated.

The solicitous treatment of a married father's parental rights under §111, per *Corey L.* in contrast to the disdain shown for appellant's points up the irrationality of the statutory classification. It cannot soundly be argued that the state has such a powerful interest in preserving the vaguely visible link between a married father and his child, and such a smaller interest in safeguarding the ties which a devoted and caring unwed father has to his, that it can protect the weak family relationship but blot out the strong one because of lack of a marriage certificate.

Section 111 provided there and here that "abandonment" was a basis for overcoming the legal barrier existing when a married father opposes adoption of his child. It had been claimed to exist in *Corey L.* to overcome a married father's objection. It was claimed to exist to overcome the unwed father's opposition here.

In *Corey L.*, two years of very infrequent contact and total non-support for longer than that was proved. This did not spell out "abandonment". For want of that dispensing-with-consent condition, the adoption failed. By contrast, the unmarried father here had steady contact at all times, as well as custody and full support just before the adoption petitions were filed. But this adoption did not fail. The reason: appellant was an unwed male parent. The children were thus adopted despite his desire to keep them and without any of the "dispensing" conditions having been proved.

When the decision below is read together with *Corey L.*, it becomes clear that New York applies *Stanley* based principles[1a] to protect fathers' substantive parental rights

[1a]The Court of Appeals in *Corey L.* credits its own *Matter of Bennett v. Jeffreys* for the basic principles. But in *Bennett*, it had deferred to *Stanley* as the doctrinal source. 40 N.Y.2d, 546. See *Matter of Sean "Y" v. John "Y"*, 62 A.D.2d 426, 427 (1978) for avowed use of *Stanley* as font of constitutional right of divorced father opposing adoption.

only when the fathers are married, but denies the benefits of *Stanley* to fathers if they are unmarried. *Corey L.* teaches that New York will be guided by the Fourteenth Amendment, as expounded by this Court, when it is in harmony with §111. But where it is not, as here, New York will follow the statute.

As for "best interest", the Court of Appeals in *Corey L.* emphasized that, at the threshold stage in an adoption case, where a married father is concerned, the "best interest of the child * * * is not involved". The court referred both to the constitutional and §111 rights of married fathers. Hence, where the adoption of children born in wedlock is concerned, it is not correct for appellees and the Attorney General to infer that "the best interests of the child" motivates New York policy at the jurisdictional threshold level. Before "best interests" becomes the issue, *Corey L.* holds the non-consenting parent must first be divested of his parental rights by strong proof of abandonment or unfitness. If not proved, that is the end of the case. At least if the non-consenting parent is a wed father or any kind of mother under §111. The statute and the 14th Amendment are in harmony for them. But not for the unwed father.

Since the unwed father has no substantive parental rights under §111, there is no statutory need to divest him of anything. This is not because of the "best interests" of his children. Appellees concede appellant to be fit enough to adopt them himself. (AEB, 15; see "IV(A)" *infra*) The sole reason for consigning him to the nether-world of parents without right to keep their children is that the statute sweepingly denies that right to unwed male parents without regard to fitness, and appellant is a member of that proscribed class.

B. *Matter of Corey L. v. Martin L.*, 45 N.Y.2d 383 (1978) and the Protection of the Rights of the Married Divorced Father in New York.

Corey L. is quoted here at length because it is now the definitive and authoritative exposition of New York adoption law as it relates to the rights of all parents — except unwed male parents. When placed alongside the holding at bar, it evidences the sharp disparity of treatment in New York between married and unmarried fathers. It illustrates the bizarre fact that the New York Court of Appeals feels itself bound to apply *Stanley* principles to married fathers, but refuses to do so where unmarried fathers' rights are jeopardized, as here. For this is what the Court of Appeals ruled concerning a married father in *Corey L.* who faced a step-father's and natural mother's adoption petition, just as does appellant at bar (after first acknowledging that "Despite recent changes in statutory law, there remains a heavy burden of constitutional magnitude on one who would terminate the rights of a natural parent through adoption." (45 N.Y.2d, 386)) (*Matter of Corey L. v. Martin L.*, 45 N.Y.2d 383, 391 (7/13/78)):

> "Petitioners urge that 'when the factual situation is within the gray area the Court should find an abandonment and conclude that the best interest[s] of the child be considered paramount to the parental interest.' But at this juncture, '[w]e do not dwell upon such considerations, for they are foreign to the issue. * * * The petitioners ask for more than custody. They seek to make the child their own' (*Matter of Bistany*, 239 N.Y. 19, 24 [Cardozo, J.], *supra*). Under section 111 of the Domestic Relations Law as applied to the instant facts, the consent of the natural father or an abandonment was a prerequisite to the judicial

termination of his parental relationship. Absent consent, the first focus here was on the issue of abandonment since neither decisional rule nor statute can bring the relationship to an end because someone else might rear the child in a more satisfactory fashion (cf *Matter of Bennett v. Jeffreys,* 40 N.Y.2d 543, 548, *supra*). Abandonment, as it pertains to adoption, relates to such conduct on the part of a parent as evinces a purposeful ridding of parental obligations and the foregoing of parental rights—a withholding interest, presence, affection, care and support. The best interests of the child, as such, is not an ingredient of that conduct and is not involved in this threshold question. While promotion of the best interests of the child is essential to ultimate approval of the adoption application, such interests cannot act as a substitute for a finding of abandonment (see *Matter of Paden,* 181 Misc. 1025, 1027; 2 N.Y. Jur., Adoption, §2, p. 5).

The severance of the parental tie could not be predicated upon the report of the Department of Social Services that the adoption would be in the best interests of the child. Where the issue was the right of a natural parent to custody of his child, this court has not hestitated to hold that a parent cannot be displaced because 'someone else could do a 'better job' of raising the child'; rather, only when 'extraordinary circumstances' such as abandonment, unfitness, or persistent neglect are found, 'the court must then make the disposition that is in the best interest of the child' (*Matter of Bennett v. Jeffreys,* 40 N.Y.2d 543, 548, *supra*). If, for purposes of determining mere custody, the best interests of the child would not permit a parent to be displaced in the absence of extraordinary circumstances, surely a complete termination of obligations and rights is not to be allowed in a situation where, as here, abandonment has not been established, even if an ensuing adoption might be viewed by some to be in the best interests of the child.

The filial bond is one of the strongest, yet most delicate, and most inviolable of all relationships, and in dealing with it we must realize that a child is not a mere creature of the State for distribution by it (cf *Pierce v. Society of Sisters,* 268 U.S. 510, 535). This is not a new problem. It is fraught with emotion, impossible to compromise and one in which the stakes are high. There has always been abiding respect for the rights of natural parents (see *People ex rel. Kropp v. Shepsky,* 305 U.S. 465, 468-469; *Matter of Livingston,* 151 App. Div. 1, 7). On the other hand, there is a coordinate need to protect children. Certainly, the amendments to section 111 of the Domestic Relations Law (Laws of 1975, ch. 704, §3; see, also, Laws of 1976, ch. 666) may be viewed as an expression of a desire to move the courts away from a perceived tendency to favor the residual rights of abandoning parents to the detriment of the child. Nevertheless, the statute should not be so broadly applied that it establishes a preference. A termination of parental rights is a drastic event indeed, so much so that it raises questions of constitutional dimension (see *Matter of Goldman,* 41 N.Y.2d 894, 895, *supra*; *Matter of Bennett v. Jeffreys,* 40 N.Y.2d 543, 548, *supra*). In any event, on this record, the burden necessary to determine those rights has not been met.

Accordingly, the order of the Appellate Division should be reversed, without costs, the petition for adoption dismissed, and the matter remitted to the Family Court, Chenango County, for further proceedings on appellant's application for custody or visitation."

Especially to be noted in *Corey L.* is the Court of Appeals statement:

"There has always been abiding respect for the rights of natural parents."

If those rights had been respected at bar as they were in *Corey L.*, appellant would not now be here. He was denied their benefits and penalized by losing his children only because of his sex and lack of marital status. Had the courts given weight to the rights of this unwed father equivalent to the divorced one in *Corey L.*, the disposition in both cases would have been the same: the adoption petitions would have been dismissed "and the matter remitted to the Family Court * * * for further proceedings on * * * custody or visitation." Those proceedings, unlike the parental rights termination involved in the adoption proceeding, would there be governed by the best interests of the children.

The refusal of the courts below to accord appellant the benefit of the principles which it applies to married fathers denies appellant substantive Due Process and the Equal Protection of the Laws.

C. Upon the Basis of a Conclusive Presumption that all Unwed Fathers are Unfit, Appellant has been Punished by Being Deprived of his Children.

Appellees contend that there is no conclusive presumption in New York that unwed fathers are unfit. To the contrary: The bypassed first step in the adoption process contains the constitutionally required elements regarding unfitness. By skipping over that stage to the "best interest of the child", but only where the non-consenting parent is an unwed father, the statute conclusively deems the first stage unfitness requirement regarding unwed fathers automatically to have been met. As applied in this case, the total absence of proof of unfitness on the part of appellant was ignored by the New York courts.

Only the trial court below reviewed the merits to any extent. Running as a thread through the opinion of Surrogate Sobel is the barely suppressed assumption that the interest of appellant in caring for his children is *de minimus* because he was an unwed father. The contrast with this Court's ruling in *Stanley v. Illinois*, 405 U.S. 645, 657 (1972) that the State's interest in caring for a child is *de minimus* if its unwed father is fit is apparent. But preferring to derive doctrinal inspiration from *Malpica-Orsini* than from *Stanley*, the courts below treated the jurisdictional unfitness threshold as if it had been proved, despite all the evidence to the contrary. This runs directly afoul of *Stanley* (405 U.S., 656):

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."
>
> (ibid, at p. 658)
>
> "It insists on presuming rather than proving Stanley's unfitness solely because it is more convenient to presume than to prove. Under the Due Process Clause that advantage is insufficient to justify refusing a father a hearing [on his fitness] when the issue at stake is the dismemberment of his family."

Upon the basis of this presumption, appellant loses his children to another. The effect is punitive: Only because he fathered two children out of wedlock, he is condemned to having them taken away from him. It is as cruel a penalty as can be imposed on any father. Even a murderer begins with

a presumption of innocence. But not an unwed father in New York.[2]

III.

QUILLOIN V. WALCOTT AND "THE FACTS ARE DETERMINATIVE; THE SOLID FAMILY RELATIONSHIP HURDLE.

Appellees and the Attorney General recognize that they must overcome the hurdle presented by the solid family relationship between father and children which spring into being at conception and birth and continued throughout their lives until it was broken up by the adoption orders. That relationship represents a firmly protected interest of parent and his children alike, and exists in this case. Not a single fact concerning it in Appellant's Brief has been challenged.

> "The private interest here, that of a man in the children he has sired and raised * * * undeniably warrants deference and, absent a powerful countervailing interest, protection. * * * Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony." *Stanley v. Illinois,* 405 U.S. 645, 651 (1972)

It is the "family" interest of a parent, including an unwed father, which is protected by the Fourteenth Amendment. Where the issue at stake "is the dismemberment of his family", the father is constitutionally entitled to a "hearing on [his] fitness before [his] children are removed from [his] custody." (ibid, 658) Indeed, "the State's interest in caring for [his] children is *de minimus* if [he] is shown to be a fit father." (ibid, 657)

The grant of review in this case followed almost immediately upon the heels of *Quilloin v. Walcott,* ____ U.S. ____ 54 L.Ed.2d 511 (1/10/78). That case called up for consideration the validity of Georgia legislation substantially identical to the New York statute reviewed here. The Georgia high court had upheld its constitutionality on the exclusive authority of *Malpica-Orsini.* (238 Ga. 230, 233) This Court affirmed for different reasons. It did so because, under the facts in *Quilloin,* the father had failed to establish a family relationship with his child such as *Stanley* held to be entitled to constitutional protection.

Quilloin refused to extend substantive *Stanley* rights to a father who had only "sired" but not "raised" or had a "family" relationship to his child. It limited *Stanley* protections to those unwed fathers who factually demonstrated that they played a true parental role in the care of their children, but denied it to others. Whether an unwed father had a relationship sufficient to invoke constitutional protection in an adoption case under *Stanley* would

[2] *In re Rodriguez,* 34 Cal. App. 3d 510, 511 Cal. Rptr. 56 (1973) A petition had been filed in the California court to have four children of a father serving a life sentence for murder of the mother freed from the custody and control of their father and placed under the Welfare Department for adoption placement. The father was not provided with court appointed counsel to represent his interest. The California court noted that "we cannot quarrel with the demonstrated interest of the appellant in resisting efforts to have his children freed from his control." (34 Cal. App. 3d, 513) It held that the father faced consequences to himself even more drastic than result from criminal prosecution. It described the petition leading to adoption of this man's child as

> "in every sense an accusatory proceeding in which the loss of parental relationship to his child may be a vastly greater punishment than the levying of a fine or even imprisonment resulting from a criminal conviction." (34 Cal. App. 3d, 515)

depend on the facts of each case. Not once did the *Quilloin* Court refer to *Malpica-Orsini.* The fears expressed there by the New York Court of Appeals should parental rights be extended to unwed fathers in adoption cases were put to rest.

Appellees and the Attorney General agree that "*Quilloin* as a definitive interpretation of *Stanley*" "plainly establishes" that "the facts are determinative". (AEB,17; AGB,15) Those are detailed in Appellant's Brief, and are nowhere denied. They are appellees' chief problem.

IV.

APPELLEES ADMIT APPELLANT'S FITNESS BUT OTHERWISE APPELLEES' AND THE ATTORNEY GENERAL'S BRIEFS CONTAIN MAJOR ERRORS OF FACT AND RECITE STATUTES NOT IN EXISTENCE WHEN THE ADOPTIONS WERE GRANTED.

A. Appellees Concede Appellant's Fitness to Adopt the Children Himself, and do not Deny his Family Relationship with Them.

Appellees' brief is marked by a concession that, if appellant had been contesting the adoption with anyone other than the stepfather, he would have prevailed.

> "* * * this was not an adoption by blood-strangers to the children." (AEB,2) "Despite the existence of some of the 'extra-ordinary circumstances' in this case, * * * if the contest had been between appellant Abdiel Caban and blood-strangers to his children, there is little doubt that his cross-petition to himself adopt would have been granted." (AEB,15)

Appellant's own fitness is thus admitted. Nowhere is there a denial of his lengthy involvement in living with and helping to raise his children. Appellees rely strongly on the fictitious premise that Kazim Mohammed - by marriage to Maria, apparently - is a "blood" relative of the children, to keep their case afloat. His relationship was the same as appellant's wife. But appellees do not say that Nina Caban was other than a "blood-stranger".

* * * * * * * *

B. Appellees' and Attorney General's Digressions and Misleading Versions of the Facts

Conceding appellant's fitness as a father and unable to contest his familial ties with his children, appellees face the dilemma that those "facts are determinative". They can only approach the evidence after it is seasoned with partisan spice.

Appellee's zeal has led them far afield into Maria's unsubstantiated complaint that Abdiel did not treat her properly, which she says justified her leaving him - as though they were married and she needed justification. (Such was the relationship into which the children were born that, to this day, appellees continue to treat it as though it was a marriage which could not be broken up without cause.) Maria's charges against Abdiel did not include a single claim of misconduct by him as a parent.

It has led them astray into gross errors of fact. And to confuse matters still further, they cite statutes for serious consideration which played no role in the adoption orders because they did not come into effect until afterwards.

Appellees' and Attorney General's Version:

"At no time did appellant formally acknowledge that he was the father of the children (74-75)" (AGB, 7) "Maria listed him as the child's father without his assent (R.74, R.122)." (AEB,22).

The Record:

The argument should fall by the wayside. It is factually incorrect and legally insignificant. The listing of Abdiel as father of David may have been without his knowledge at the time, but it was certainly not "without his assent". There is no testimony that he objected to this. Indeed, he always acknowledged his fatherhood of both children. (R.221, 336-7) Appellant "formally acknowledged" his paternity of Denise before the Board of Health (R.85-6). He formally acknowledged paternity of both in his cross-petitions to adopt them. (A.11, 16)

But it is characteristic of upholders of the constitutionality of the treatment to which appellant was subjected to avoid the realities of his relationship to his children and to harp instead on formalities. If there is any constitutional significance of a "formal acknowledgement of paternity", where there is informal acknowledgement by word and deed, and fatherhood is not disputed, it has not been explained. Nothing in *Stanley v. Illinois* makes this a predicate for protection of the parent/child relationship under the Fourteenth Amendment. "Formal acknowledgment" of paternity made no difference in any event, as witness the result below.

* * * * * * * * * * *

Appellees' and Attorney General's Version:

Appellant "had no arrangement" to support Gloria, his wife at the time, and the children of his eight year dormant

marriage to Gloria, and there was no evidence he did so. (AEB,21; AGB,7)

The Record:

The evidence was noted by the trial court that he supported the children, "arrangement" or no (A.29; R.390).

* * * * * * * * * * *

Attorney General's Version:

"Appellant did not attempt to divorce his wife Gloria while he was living with Maria, nor did he ask or offer to marry Maria" (AGB,7).

The Record:

"I had been trying to get a divorce from her for the longest time. I had not been successful." (R.354) When appellant finally obtained it in June, 1974, he proposed marriage to Maria because he wanted the children back. She turned him down without informing him that she had already married Kazim. (R.353-6) Indeed, Maria made no claim she had ever wanted to marry appellant in the first place.

* * * * * * * * * * *

Appellees' and Attorney General's Version:

Maria paid "all the household expenses", etc. (AEB,22; AGB,7)

The Record:

That was Maria's claim. Appellant testified otherwise. (R.337-340) The trial court accepted his testimony and not hers. (A.28)

* * * * * * * * * * *

Appellees' and Attorney General's Version:

The grandmother told appellant the children were being

removed to Puerto Rico and he did not object. (AEB,24; AGB,8)

The Record:

This is what Maria's mother claims. Appellant denied it. (R.352, 357-8, 371) One thing is certain: Appellees sent the children away to Puerto Rico and appellant brought them back.

* * * * * * * * * * * *

Appellees' and Attorney General's Version:

Appellant did not communicate with the maternal grandmother or the children while they were in Puerto Rico. (AEB,24-25; AGB,8)

The Record:

Appellant's father in Puerto Rico was in frequent contact with the children there and appellant was in constant touch with him concerning their welfare. (R.242-244, 358-9)

* * * * * * * * * * * *

Attorney General's Version:

"It should be noted that the trial court could not find even a scintilla of evidence supporting appellant's contention that Maria had abandoned the children. (Appendix, p.30)" (AGB,8)

The Record:

Whether Maria had abandoned the children was relevant only to their stepmother Nina's cross-petition to adopt. The Attorney General omits to note that there was not "even a scintilla of evidence supporting [appellees'] contention that [appellant] had abandoned the children," as alleged in their petitions to adopt and in their citations (A.4,6,7,9). Nowhere in any of the opinions below was there a finding of abandonment on the part of appellant.

* * * * * * * * * * * *

Attorney General's Version:

The Family Court returned custody of the children to Maria on November 25, 1975 (378)" (AGB,8)

The Record:

Not so. The page reference does not support the date. The date of the Family Court order temporarily transferring custody from the father to the mother with visitation rights reserved to the former pending a hearing on the merits was January 15, 1976. No hearing was ever held. (A.29; R.270-1, 374-9) On the date mentioned in the Attorney General's Brief, appellant was exercising exclusive custody of his children. He continued to do so for two months until January 15, 1976, the date of the Family Court order. On or about that same day, appellees filed their adoption petitions (A.3,5) alleging that appellant had abandoned the children (A.4,6). Appellant had enjoyed full custody of the children for the last two months of the sixteen months preceding the filing of the adoption petitions, and appellees not at all.

* * * * * * * * * * * *

Attorney General's Interjection of the Issue of the Wealth of the Respective Parties and Appellant's Need to Obtain Leave to Proceed In Forma Pauperis into the Case:

Appellees' friend goes beyond the record on which the adoptions were granted to reach filed material relating only to the relatives affluence of the parties, as though it bore on the constitutional issues. He draws the Court's attention to appellant's motions to proceed as a poor person in the Court of Appeals and here.

Appellant does not shrink from this. The facts are clear: Appellant bought a house to accommodate his children;

before they could all move in, the children were permanently taken from him by the adoption orders; appellant has stripped himself bare in his legal fight to regain them; and he has lost his new house by foreclosure while waging that fight.

While appellant is pleased to learn that "appellees have borne the expense of this litigation by themselves (AGB,9), he is at a loss as to how this relates to the issues of the case. Apparently, the Attorney General would have this Court be influenced into ruling the statute which he defends to be constitutional as applied because the natural father does not have as much money as the stepfather. The children might just as well be on the auction block and sold to the richest bidder. The Attorney General's reference to this difference of wealth between the contending parties is odious.

* * * * * * * * * * *

Attorney General's Version:

"In the instant case, appellant never obtained nor attempted to obtain legal custody of the children." (AGB,13)

The Record:

Appellant was litigating legal custody with Maria in Family Court before the adoption proceedings were commenced in Surrogate's Court. (A.29) During that period, appellant himself had actual custody of his children.

* * * * * * * * * * *

Attorney General's Version:

"Although he did have actual custody for various periods of time * * *" (AGB,13)

The Record:

"Various periods of time" translates into more than half

the life of each child as of the date of the adoption orders.

* * * * * * * * * * *

Attorney General's Version:

The nature of the case is that it is a "custody proceeding" (AGB,13)

The Record:

It is not that. It is a contested "adoption" case. The difference is profound. Adoption involves an attempt to terminate a natural parent's rights by substituting a blood stranger in his place. (*Corey L.*) The only "custody proceeding" in the Record is the one that pended in the Family Court while this adoption proceeding worked its way through the Surrogate's Court, and which finally died on the vine. (A.29)

* * * * * * * * * * *

Attorney General's Version:

"The court did not attempt to break up an existing family unit. The court placed the children in a home they were already living in." (AGB,13)

The Record:

The court attempted to break up a life-long family unit of children with their father. When ordered adopted, the children belonged to two family units: their father's unit, including their stepmother Nina; their mother's unit, including their stepfather Kazim. During the two months before the filing of the adoption petition, they were a constituent part of their father's family unit. During the preceding fourteen months, they were in Puerto Rico, a physical part of neither unit, having been sent there by their mother and stepfather. During the six to nine months before that, they lived with their mother and stepfather, but spent

weekends with their father. Prior to that, from birth until their mother removed herself and them from the family home, the children lived in a family home with both mother and father, raised and cared for by both. Later, during the eight months in which the adoption proceedings pended in the Surrogate's Court, the children were temporarily with the mother, their father seeing them weekly pending a Family Court hearing and custody determination, which never took place. The adoption orders severed the children's existing family relationship with their father and broke up that family unit. An existing family unit with their stepfather Kazim had hardly begun, despite his two and one-half year marriage to their mother.

* * * * * * * * * * *

Attorney General's Version:

The lower courts "could find no credible evidence that the children were anything but healthy and happy in the existing (sic) family unit." (AGB,13)

The Record:

There was also no evidence "that the children were anything but healthy and happy in the existing family unit" with their father, nor was any finding contrary to this ever made by the lower courts. (See Appellant's Brief, pp. 10-15, with "R" and "A" references)

* * * * * * * * * * *

Attorney General's Version:

"The Surrogate, as evidenced by his decision, also based much of his decision on the credibility of appellant's witnesses. These witnesses were personally before the Surrogate and their credibility was judged by one of New York's most experienced trial jurists." (AGB,13)

The Record:

The witnesses were not "personally before the Surrogate." Not a single witness was seen or observed by one of New York's most experienced trial jurists. He was not even present at the trial. This was "heard before Renee Roth, Esq., a Law Assistant to the Surrogate of Kings County". (A.31,34, R.71, 235, 259)

* * * * * * * * * * *

Appellees' and Attorney General's Version:

"Factually, the only distinction between *Quillon* and this case, was that Quilloin had not lived with the natural mother for any period of time." (AEB, 38-9) "In fact, appellant's contributions to the relationship were not much more that Mr. Quilloin's * * *. We are confronted with a fact situation as devoid of paternal interest and care as in *Quilloin.*" (AGB,15)

The Record:

Another distinction is that appellant lived with his children for many years and shouldered the burdens of parenthood in their care. "In fact" we are confronted with the breaking up of a family where there was a "paternal interest and care" much like that which one might find in the case of a devoted and concerned married father, and to which the *Quilloin* facts do not even bear comparison.

* * * * * * * * * * *

Appellees' Version:

"However the appellant's briefs distort the character, fitness and concern of this unmarried father, the Surrogate in approving the adoption, justifiably found him unfit, unconcerned and unsupportive." (AEB,27)

The Record:

No court ever found appellant to be "unfit, unconcerned

and unsupportive", or made any other derogatory findings concerning him as a person or as a father. (See Opinion of Surrogate, A.27-30; Memorandum Opinion of Appellate Division, A.41-2; Memorandum Opinion of Court of Appeals, A.45) If any court had done so, it would be expected that appellees would have pointed out where. Since no court had done so, appellees merely inserted this blatantly erroneous statement in their brief and left it undocumented. Even appellees concede his fitness.

* * * * * * * * * * * *

C. Appellees' and Attorney General's Erroneous Recital of Statutes Which Were Enacted After the Adoption Orders.

Appellees and the Attorney General each go so far as to cite versions of statutes and whole sections of law, which had not even been enacted at the time of the adoptions, as the relevant statutes involved. The adoption orders came down September 10, 1976. (A.31, 34, 37, 39) Appellees set forth Section 111, as it had been amended, effective January 1, 1977. (AEB,4-8) The Attorney General sets forth the complete text of N.Y. Dom.Rel.L., §111-a, which also did not become effective until January 1, 1977. (AGB,2-5) Obviously neither played any role in this case which had already been decided. Both appellees and the Attorney General agree that the statute which governed, N.Y. Dom.Rel.L., §111, as it stood at the time of the adoptions, is correctly reproduced at pp. 5-6 of Appellant's Brief. (AEB,8; AGB,2)

In addition, the Attorney General cites an amended version of New York Fam. Ct. Act, §522. This he agrees was not only "made effective after the initiation of the

instant proceeding". It was also not in effect when the adoption orders were rendered on September 10, 1976. The effective date of the amendment was January 1, 1977. The Attorney General concedes that it would not have changed the result if it had been in force earlier. (AGB,10) But he nonetheless proceeded to make the misleading claim "that it permits a putative father to petition the courts of New York State to legitimate his child at any time during the lifetime of the putative father." Amicus, ACLU, also drew the same erroneous conclusion, apparently based on confusion regarding its effective date. (ACLU Brief,2) This all misleads by making it appear that appellant had the option to legitimate the children if he had chosen to exercise it. He did not have the option.

Before McKinney's Session Laws of 1976, Chapter 665, §6, eff. 1/1/77, amended §522, only the mother of a child born out of wedlock could initiate a filiation proceeding. By the amendment, the father of such a child was enabled to do so for the first time. A father who attempted to petition for an order of filiation before January 1, 1977, to legitimate his children lacked standing and the proceedings would be dismissed. *Matter of Alvin B. v. Denise C.*, 85 Misc.2d 413 (1976) But by that date appellant's children had already been "adopted" by Kazim Mohammed.

In fact, appellant attempted to legitimate the children by use of the only available remedy. This was his cross-petition to adopt. The effort was vetoed by the female appellee. No other legal avenue was open to him.

But not even a filiation order at the instance of the mother could have saved appellant's parentage under §111. It had been stipulated in *Malpica-Orsini* (36 N.Y.2d 568, 569) that the father there had been adjudicated to be the father. This did not make his consent to the adoption necessary

under the statute. Said the Court of Appeals in that case: (536 N.Y.2d, 576)

> "To allow it for fathers adjudicated to be such in compulsory proceedings would not alleviate the situation measurably since they are likely to be resentful and their enforced nexus with the child bears no relationship to their entitlement."

V.

THE COURT OF APPEALS DISMEMBERS STANLEY v. ILLINOIS IN NEW YORK.

A. The Selective Denial of Substantive *Stanley* Rights in New York to Unwed Fathers.

So far has New York strayed from adhering to the decisions of this Court in the area that *Stanley v. Illinois* is accepted as the law of the land on substantive due process in the case of all parents except, ironically, unwed fathers. *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 546 (1976), adjudicating a natural mother's parental rights, paid tribute to *Stanley* as the font of the applicable constitutional principles relating to parental rights. *Matter of Goldman*, 41 N.Y.2d 894 (1977) and *Corey L.* (1978) in turn applied *Bennett v. Jeffreys* "*Stanley*" doctrine to a mother and a married father respectively. *Malpica-Orsini* sweepingly denies it to unwed fathers.

B. The *Stanley* Principles are Accepted Throughout the Country as Governing the Rights of Parents, Including Unwed Fathers, in Adoption Cases, but in New York only of Wed Fathers.

Appellant urged the courts below to apply the *Bennett v. Jeffreys* "*Stanley*" doctrine to himself as an unwed father. Appellees opposed its application. The courts below agreed with appellees and refused to do so. Six months later, in *Corey L.*, the Court of Appeals found that the doctrine indeed did apply to a married father. Appellees, in an abrupt about face, now quote from the *Bennett v. Jeffreys* recital of *Stanley* principles extensively in their brief to this Court.

If their purpose in reciting *Bennett v. Jeffreys* was to show that the first "unfitness" and the second "best interest" stages have merged in New York, they were just done in by *Corey L.* In the July 1978 *Corey L.* decision, the Court of Appeals held that the two stages remain separate, distinct, and inviolably so, as a matter of constitutional and statutory law for married fathers.

At the time of *Stanley v. Illinois*, (1972), only five states in the Union gave fathers of children born out of wedlock the right to safeguard their relationship with their children in adoption cases.[3] *Stanley* was not an adoption case but, twenty-eight additional states, plus the District of Columbia, understood its relevance to the consent provisions of their adoption laws. Twenty-eight jurisdictions amended their relevant statutes[4] and a court decision voided the

[3]Ala. Code 17: §3; Idaho Code 16-1510; Nev. Rev. Stat. §127.040; R.I. Gen. Laws Ann. §15-7-5; S. Dak. Codified Laws 25-6-1.

[4]Ariz. Rev. Stats. §8-106; Civ. Code of Calif. §224; Colo. Rev. Stat. 1973 §19-4-107; Conn. Gen. Stat. §45-61; Del. Code. 13 §1106(2); Dist. of Col. Code. §16-304; Fla. Stat. Ann. §63.062; Hawaii Rev. Stat. §578-2; Iowa Code 600.7; Ill. Stat. Ann. 4 §9.1-8;

(continued)

contrary old statutes in Pennsylvania[5] so as to safeguard the parental rights of unwed fathers. A total of thirty-four jurisdictions are now in compliance with *Stanley*. New York is among the minority of hold-out states. *Malpica-Orsini* furnished its rationale.

C. The *Malpica-Orsini* Assault on *Stanley*.

The constitutionality of the New York statute denying non-consent rights to all unwed fathers was sustained below on the basis of *Malpica-Orsini*. That case is heavily relied on by appellees and the Attorney General. The New York Court of Appeals looked darkly upon *Stanley v. Illinois*. (36 N.Y.2d, 575)

> "Following the decision in *Stanley v. Illinois* (405 U.S. 645), Ursula Gallagher, an adoption specialist in the Department of Health, Education and Welfare, in expressing apprehension, observed: 'The new legalities would mean that many of these children [available for adoption] will spend their early lives in foster homes'; and Dr. Ner Littner, psychiatric consultant to agencies in Chicago, said: "We know today that keeping a baby in a boarding house can cripple him emotionally'

(footnote continued from preceding page)

Burns Ind. Stat. 31-3-1-6; Ken. Rev. Stat. 199-500; Mich. Comp. L. Ann. 710.43; Minn. Stat. Ann. §§259.24, 257.26; §1 House Bill 972, 2d Reg. Sess, 79th Genl. Assembly, Mo., (eff. 8/13/78); Rev. Stat. Neb. §43-104; N.M. Stat. Ann. 22-2-25; Gen. Stat. N.C. §48-6; N.H. Rev. Stat. Ann. 170-B:5(d); Page's Ohio Rev. C. §3107.01(B); Ore. Rev. Stat. 109.098; Code of Laws of S.C. 1976 §15-45-70; Vernon's Texas Codes Ann., Fam. Code, §16.03; Code of Virginia 1950 §63.1-225(2); Rev. Code of Wash. Ann. 26.32.030; W.Va. Code §48-4-1; Wisc. Stat. Ann. 48-84(3); Sess. L. of Wyoming, 1977 Ch. 187 1-726.9.

[5]*Adoption of Walker*, 468 Pa. 165, 360 A.2d 603 (1976)

> (Fathers' Rights—Supreme Court Rulings on Adoption Complicate the Placing of Children, Wall Street Journal, July 9, 1972, p. 1, col. 1)."

The New York court reasoned that "adoption is a means of establishing a real home for a child." It emphasized its role in "promoting the welfare of an otherwise homeless child." It stated that "never before have there been so many thousands of children for whom society finds each year that it must make some provisions." With dread, it warned of the disasters which it claimed would result from requiring "the consent of fathers of children born out-of-wedlock * * *, or even some of them." These included: "denying homes to the homeless"; "depriving innocent children of the other blessings of adoption"; continuing "the cruel and undeserved out-of-wedlock stigma"; severely impeding "the worthy process of adoption"; difficulties "in locating the putative father"; lack of birth certificate identification of the father; post-adoption harassment of adopting couples; dissuasion of couples considering adoption; and "oppressive burden on charitable agencies"; the "unlikelihood" of obtaining the natural father's consent to an "early private placement"; granting "to unwed fathers of the right to veto adoptions will provide a very fertile field for extortion"; discouragement of marriages because prospective husbands denied the prospect of adopting their offspring would shrink from nuptials with mothers. (All cited in Attorney General's brief, 16-19)

None of these problems apply or exist at bar. The children were not homeless. They do not need the "blessings of adoption". No "cruel and undeserved out-of-wedlock stigma" would attach if appellee Maria had not vetoed appellant's cross-petition to adopt. The difficulty here was not in locating the father but in dislocating him.

No charitable agencies were involved. The public purse was not threatened. "A fertile field for extortion" of a devoted father by a vindictive mother who could simply use her power to deprive the father of his children as a weapon was created by the holding below. No marriage was discouraged by lack of adoption possibilities. (And if this issue be credited with even a modicum of weight, it could as well be applied to Nina's marriage to Abdiel, as to Maria's to Kazim.)

Especially after *Quilloin*, the *Stanley* rights of parents are reserved for only those unwed fathers who have shared a family relationship with their children and borne responsibility for their daily care. The putative fears of *Malpica-Orsini* were dispelled, if they ever had any foundation.

Nonetheless, appellees depend on a pronouncement by this Court that even the strongest ties between unwed fathers and their children, are helplessly vulnerable to rupture at the whim of mothers and their newly-acquired husbands. Not only would this require a complete overruling of *Stanley* and *Quilloin*, and of the traditional principles which those cases expressed, but such a holding would be self-defeating. It would tend to discourage fathers from exposing themselves and their children to that threat. Men and women would, of course, not be dissuaded from out-of-wedlock sex. But when children result, their fathers would be told by this Court not to love and care for them except at their peril. Fathers would be encouraged to keep away from their children, lest they build a family relationship on legal quicksand. Instead of support fostered and voluntarily given based on bonds of parental affection, it would be left to compulsion afforded by filiation proceedings and by the support of dependents' laws. The

effect would be to deprive children of fathers and add to the number of homeless, fatherless children, with adoption or foster care as the only "solution". The argument that such a decision would so favor "the best interest of the child" and lighten the burden on the public purse and child welfare and adoption agencies, as to warrant taking Caban's children away from him, is fatuous.

A careful appraisal of Stanley's impact authoritatively appears in The Journal of School Health. (*The Unmarried Father Revisited*, Reuben Pannor, Director of Case Work and Research, Vista Del Mar Child Care Services, Los Angeles and Byron W. Evans, Senior Statistician, American National Red Cross, Washington).[6] Summarizing their review, the authors state: (at p. 290)

> "In conclusion, legal implications of STANLEY vs. ILLINOIS may in the long run prove advantageous to single parents and their children. The single father has long been overlooked by many social agencies. But this is no longer possible, and the involvement of the father that now becomes necessary by law can result in better social work services. Helping single fathers act in responsible ways must be viewed as a positive step that can have positive effects upon the father, the mother, and the future of the child. The child's welfare should be the overriding consideration as alternative plans are being considered. Nevertheless, the rights of the father who desires and claims competence to care for his child should be protected, the interests of all three parties need to be taken into account. Only when this is done can we hope for viable solutions to problems that have deep roots and affect many lives for years to come."

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[6]The Journal of School Health, XLV No. 5: 286 (May 1975).

D. The Dismemberment of *Stanley*.

But for fear of the speculative horrors which *Malpica-Orsini* postulates, the New York court sought to avoid following *Stanley*. It defiantly refused to grant unwed fathers their substantive rights. *Stanley's* mandate that such parents, like all others, "are constitutionally entitled to a hearing on their fitness" before losing their children to strangers (405 U.S., 658) was, *mirable dictu*, transformed by the Court of Appeals into what could be read as "constitutionally entitled to a hearing on the best interest of their children." In the present case, in the wake of *Malpica-Orsini* — this Court's interpretation of the Fourteenth Amendment in *Stanley* having passed into discard in New York because of it — the father's right to a hearing on his own fitness has been transmuted by judicial alchemy and shrunk into the right to offer evidence "concerning the solidity of the marriage and the concern and treatment of the child [sic] in the new family." (Surrogate Sobel's Opinion, A.28)

This is no "right" worthy of the name. The unwed father might as well be given a free ticket to ringside. "The private interest here, that of a man in the children he has sired and raised * * * the interest of a parent in the companionship, care, custody and management of his children * * *, the right to * * * raise one's children [which] have been deemed 'essential' * * * 'basic civil rights of man' * * * 'rights far more precious * * * than property rights' " (*Stanley v. Illinois*, 405 U.S., 651) is debased to mean a "right" to be present at the ceremony at which the father is to lose his children, and to say a few words on the merits of a man he knows nothing about before the final gavel is struck and he is replaced as parent by a total stranger. For if

adoption is always so necessary in the best interest of children born out-of-wedlock, who are far from homeless, that the right of a fit and devoted father to keep them must be written off, the only question remaining is the fitness of the adoptive parent. That is exactly what the courts below held to be the issue. This Court's interpretation of rights under the United States Constitution in *Stanley* was airily ignored as overruled on the authority of the State high court's decision in *Malpica-Orsini*.

It is fundamental that the primary right and responsibility to raise and care for children belongs to their parents. Where a parent is fit, has exercised that role, and desires to continue doing so, this is the end of the matter. It makes no difference whether the parent is male or female, married or not. "The State's interest in caring for Stanley's children is *de minimus* if Stanley is shown to be a fit father." (405 U.S., 657)

Hence, establishment of unfitness is a constitutionally mandated threshold in any proceeding leading to termination of parental rights. This rule of *Stanley* has been rejected by the Court of Appeals specifically in cases involving unwed fathers — the very class of parents specifically involved in *Stanley*. The New York court, in *Malpica-Orsini* and here, bisected the *Stanley* rule into its procedural and substantive Due Process elements and dismembered it The procedural aspect — notice and hearing, was preserved. But the substantive threshold purpose of the hearing — to determine fitness — was thrown out. It was not to be restored by the Court of Appeals until that court considered an effort to dispense with the consent of a duly married father to the adoption of his children by a stepfather. *Matter of Corey L., supra.* And there, the *Stanley* principles and the §111 statutory

safeguards for married, as distinct from unmarried, fathers were all resuscitated and recognized — at least as jurisdictional thresholds for the protection of married fathers' rights.

Malpica-Orsini, in turn, appears miraculously to have been saved from reversal because its shallow record failed to raise a substantial constitutional question. (*Orsini v. Blasi*, 423 U.S. 1042). An evidentiary hearing had been waived in that case. The only facts before the Court, despite appellees' contentions to the contrary, (AEB,33-4), were those stipulated by the parties.[7] The facts did not include that the father had ever played any meaningful parental role toward his child. It was not agreed in that case that he had raised his offspring or had a family relationship with her, such as was entitled to constitutional protection under *Stanley*. The record here, in contrast, establishes those facts.

Dismissal of the appeal in *Orsini v. Blasi* should be without persuasive force. At bar, on different facts, the Court did not dismiss, but noted probable jurisdiction. It will review the constitutionality of the statute as applied to a father with a sturdy ongoing family relationship with his children for the first time.

[7]A copy of the stipulation of facts in *Malpica-Orsini* is appended to Appellant's Brief in opposition to appellees' motion to dismiss the appeal or to affirm.

CONCLUSION

The judgments on appeal should be reversed.

Respectfully submitted,

ROBERT H. SILK
Attorneys for Appellants

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77-6431

ABDIEL CABAN,

Appellant,

-against-

KAZIM MOHAMMED AND MARIA MOHAMMED,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LEGAL AID SOCIETY OF NEW YORK CITY.

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANT, AND STATEMENT OF INTEREST OF THE AMICUS

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Counsel for Amicus Curiae

The Legal Aid Society of New York City respectfully moves this Court, pursuant to Rule 42 of the Rules of the Supreme Court, for permission to file the attached brief amicus curiae in support of the appellant, Abdiel Caban, by reason of the amicus' substantial interest in the outcome of this case and its considerable experience in litigation concerning the constitutional issues presented herein.

1. Movant The Legal Aid Society is a private, not-for-profit organization incorporated under the laws of the State of New York for the purpose of rendering legal representation and assistance to persons in New York City whoare without adequate means to employ other counsel.

2. This appeal presents a constitutional question of far-reaching and fundamental importance to large numbers

of the indigent persons in New York City whom it is the Society's purpose to serve, namely the question of the constitutional right of an unwed father, absent a showing of abandonment or unfitness, to prevent the adoption of his child, and thereby to receive the same protection in regard to his fundamental interest in his child that is accorded to all other parents in New York State.

3. The client population of the Civil Division of The Legal Aid Society includes substantial numbers of persons who have illegitimate offspring, and the constitutional question involved in this case is of great importance to those unwed fathers and their children whose relationships and legal status as parent and child may be permanently terminated by adoption, over their objections, without a showing of abandonment or unfitness of the parent, solely

because the child was born out of wedlock and the parent is a male. As lawyers for the City's poor, The Legal Aid Society has long concerned itself with advancing, in every appropriate forum, the legal rights of its clients. The Society's lawyers have considerable experience with the kinds of constitutional issues presented here, and specifically, substantial knowledge and experience concerning the nature and consequences of familial relationships involving out-of-wedlock children, as well as with the operation of those statutes governing child custody, termination of parental rights and adoption in the State of New York.

4. The constitutional question raised by the instant appeal, concerning the rights of unwed fathers who have borne significant and direct responsibility for the custody and supervision

of their children to prevent their adoption in the same manner as other natural parents, is one of vital concern to The Legal Aid Society in its efforts to assist fully in litigation of issues that affect the poor. Attorneys from The Legal Aid Society have represented unwed fathers before this Court in Fiallo v. Bell, 430 U.S. 787 (1977) and as amicus curiae in Matter of Lalli v. Lalli, No. 77-1115, probable jurisdiction noted, March 20, 1978.

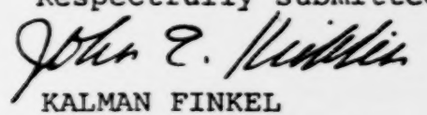
5. Movants thus have an obvious and immediate interest in the issue before this Court on appeal. Counsel for appellant has consented to the filing of this brief amicus curiae. This motion is filed because the Attorney State General of New York has refused consent.

WHEREFORE, movant prays that the attached brief amicus curiae be permitted to be filed with the Court.

5-m

Dated: New York, New York
June 27, 1978

Respectfully submitted,



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STATEMENT OF THE CASE

This case concerns the constitutionality, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, of New York Domestic Relations Law (DRL) § 111 as applied to authorize the adoption of children born out of wedlock over the objections of their father with whom they have lived and/or maintained regular contact throughout their lives, without a prior determination that the father has abandoned them or is unfit as a parent, solely because the father has not been married to the children's mother. More specifically, the question presented here is whether the State of New York may constitutionally deny the appellant natural father the right to prevent the adoption of his children by their step-father, in the absence of proof of parental unfitness or abandonment, when such a right is afforded to all other parents, including unmarried mothers and divorced or separated fathers.

The Challenged Statute

At issue on this appeal is the constitutionality of DRL § 111, which sets forth requirements for obtaining consent of certain parties before the adoption of a minor child may take place, and which permits the waiver of such consent in a number of different circumstances. It is necessary, under New York law, to obtain the consent to an adoption of the child, if over age 14; of the parents of a child born in wedlock; or the mother of a child born out of wedlock. DRL § 111 (1)(a)-(d).[1] Consent of the parents

1. Formerly DRL § 111(a)-(4), renumbered by Laws of 1976, Chapter 666, effective January 1, 1977.

is not required for the adoption of an adult over the age of 18 and the consent of the legal custodian of a child, other than a parent, can be dispensed with if the court finds that to do so is in the best interests of the child. DRL § 111 (4).[2] But if either parent of a legitimate child, or the mother of an out of wedlock child, refuses to consent, the child cannot be adopted unless the objecting parent has forfeited the right to withhold consent by abandoning the child, or by manifesting unfitness in one of the forms explicitly designated by statute.

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2. The substance of these provisions waiving consent in certain instances was formerly contained in unnumbered paragraphs following DRL § 111(4). The former version of the statute, which was in effect at the time of the trial in the case at bar, is set out at page 4 of Appellant's Jurisdictional Statement.

Only the unwed father's parental rights may be terminated and his children adopted over his objections without a showing of abandonment or unfitness. Pursuant to DRL § 111-a, he is entitled to notice of a proposed adoption, and to be heard on the issue of whether the adoption will be in the child's "best interest." But he has no right to veto the adoption; the extent of his past involvement with the child and his current fitness as a parent are relevant only insofar as they affect the court's determination of the best interest of the child.[3]

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3. Parental consent to an adoption has been a requisite in all versions of the statute since its inception. See, L. 1873, c. 830; L. 1896, c. 272; L. 1909, c. 19; L. 1938, c. 606. The consent of an unwed father has never been required. Notice of adoption proceedings and the right to an opportunity to be heard on the best interests of the child were first expressly granted to unwed fathers in an attempt to comply with this Court's decision in Stanley v. Illinois, 405 U.S. 645 (1972). L. 1976,

(footnote continued on next page)

Statement of Facts

Certain key facts not in dispute are critical to resolution of the legal issues presented on this appeal, and they are briefly summarized here. Appellant Abdiel Caban lived with appellee Maria Mohammed in New York City for 5 years, commencing in 1968. They conducted themselves and held themselves out to the community as husband and wife. Two children were born to the couple: David, born in 1969, and Denise, born in 1971. Mr. Caban has at all times freely and fully acknowledged paternity of both children. His name appears on their birth certificates and they have been known by his surname. During the years the family lived together as a unit, the parents shared financial and other respo sibilities for the children's care and

c. 665, effective January 1, 1977. See also, McKinney's 1976 Sessions Laws, vol. 2 p. 2442. The relevant provision, as currently in effect, is set forth in the appendix to this brief.

well-being. When Maria left Mr. Caban to live with and marry appellee Kazim Mohammed,[4] she took the children to live with her, but they continued to see their father each weekend. After a period of six to nine months, the children were abruptly sent by their mother to live in Puerto Rico, with their maternal grandmother. During the fourteen months the children remained in Puerto Rico, Mr. Caban was kept regularly informed of their health and development through his father, the children's grandfather, who lived nearby in Puerto Rico and regularly visited with his grandchildren. In November, 1975, Mr. Caban went to Puerto Rico and brought the children back to New York to

4. The precise date on which appellee Maria Mohammed ceased living with appellant is in dispute.

live with him and his new wife, Nina, and her two children from a previous marriage. As the family was now too large for the Caban's apartment, Mr. and Mrs. Caban began looking for and eventually purchased a 4-bedroom home in Brooklyn where all the children could live comfortably. Shortly thereafter, Maria Mohammed commenced a proceeding to obtain custody of the children in Kings County Family Court. A temporary custody order was entered in favor of the children's mother, pending a full trial on the merits. Visitation was granted to Mr. Caban, who continued to see the children regularly, until the Orders of Adoption were entered by the trial court below.

But the custody trial in Family Court was never held, because appellees petitioned the Kings County Surrogate's Court, pursuant to DRL Article 7, to

adopt the children. Mr. Caban appeared in the Surrogate's Court proceeding, objected to the adoptions and, together with his wife, cross-petitioned for adoption of both children. At trial, Mr. Caban maintained that in light of this Court's holding in Stanley v. Illinois, 405 U.S. 645 (1972), David and Denise could not be adopted without his consent or a showing of his parental unfitness or abandonment. The trial court rejected these contentions and specifically held that Mr. Caban was entitled to a hearing only on the issue of whether the proposed adoptions of his children by their mother and step-father were in their best interests:

> ... the putative father's consent to such an adoption is not a legal necessity ... The prime objective of allowing a putative father to be heard is therefore not to determine the degree of his interest in the child but rather

> to determine the best interests of the child. Any evidence the putative father may offer concerning the solidity of the marriage and the concern and treatment of the child in the new family is particularly relevant.

Unreported Opinion, Surrogate's Court Kings County, Appellant's Appendix at pp. 27-28. (emphasis added).

Following the trial, appellees' petition for adoption were granted, thereby severing all parental ties between Mr. Caban and his children, and supplanting him as their father with their step-father, appellee Kazim Mohammed. See Surrogate's Court Opinion, supra, at p. 30. The cross-petitions for adoption brought by Mr. Caban and his wife were summarily denied, since the mother of the children refused to consent, as required by DRL § 111(3). Surrogate's Court Opinion, supra at p. 27.

The Appellate Division, Second Department, and the Court of Appeals of the State of New York each in turn dismissed appeals from the Surrogate's Court orders approving the adoptions of David and Denise Caban by their mother and step-father, for lack of a substantial constitutional question, on the authority of this Court's dismissal of the appeal in Matter of Malpica-Orsini, 36 N.Y.2d 568 (1975), app. dismissed, sub nom, Orsini v. Blasi, 423 U.S. 1042 (1976). Matter of David Andrew C., 56 A.D.2d 627 (2d Dept. 1977); Matter of David A.C., 43 N.Y.2d 708 (1977). Motions for rehearing and reargument before the New York Court of Appeals in light of this Court's subsequent decision in Quilloin v. Walcott, ___ U.S. ___, 54 L.Ed.2d 511 (1978) were denied, and this appeal followed.

By this amicus curiae brief submitted in support of the appellant Abdiel Caban,

The Legal Aid Society of New York City sets forth its argument as to why this Court should invalidate New York's adoption statute insofar as it is applied to deny unmarried fathers with close family ties to their children the same protections against unwarranted termination of their fundamental parental rights as are afforded to all other parent in this state.

INTRODUCTION AND SUMMARY OF ARGUMENT

By denying fit unwed fathers the same right to block non-consensual adoptio of their children afforded to all other parents, DRL § 111 violates the natural parent's constitutionally protected right to family integrity under the Due Process Clause, and discriminates against him on the basis of sex and marital status, in contravention of the Equal Protection Clau Adoption effects the complete, permanent

severance of all familial ties between parent and child; only in the case of unmarried fathers is this severance permitted to occur over the parent's objections, and in the absence of any showing of abandonment or unfitness to perform parental responsibilities. Thus, in the instant case, the unwed father's substantial, ongoing relationship with his children was intruded upon and terminated without affording him the protections which due process requires. Moreover, these harsh and extreme consequences were imposed upon him solely because of his sex and marital status, despite the absence of any demonstrable nexus between either factor and the nature of the parent-child relationship severed by adoption.

The gravity and purposelessness of the discrimination worked by the challenged statute can be fully appreciated only when viewed within the context of the overall

legislative scheme governing child care[5] in New York State. When the challenged provision is evaluated against the backdrop of the entire New York system it becomes readily apparent that the invalidation of the discrimination against unwed fathers contained in DRL § 111 will guarantee all constitutionally protected interests full recognition, and that, at the same time, the underlying purposes of the New York child care system will be given effect. The statutory scheme governing child custody and care in New York State, when viewed in its entirety, contains ample protections for the best interests of the child, and there is no justification or purpose which is sufficiently weighty to

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5. The phrase "child care system" as used throughout this brief is intended as a convenient reference to that body of statutory law governing child custody, visitation, support and adoption in New York State. Other aspects of the child care statutes, e.g., those dealing with foster care, day care, child protection, are not relevant to the issue on appeal, and are not encompassed by the phrase as used herein.

counterbalance the statute's violation of the fundamental constitutional rights of the unmarried father in his relationship to his children.

From the point of view of the unwed father, the consequences of the adoption of his children by a stranger are significant, drastic and irrevocable. In comparison, the salutory effect upon the children of adoption by the family which has their custody is not nearly as substantial. Moreover, the rights of the natural mother to the continued care and custody of her children are not threatened or disturbed by the preservation of the father's parental rights, nor would the natural father's successful veto of the adoption permit his securing of custody or visitation when such would not serve the best interests of the children. Finally, the provisions of the statute which allow the waiver of consent to adoption of parents who have abandoned their

children or shown themselves to be unfit prevents any parent whose interests in his children are insubstantial from hindering their adoption.

It is in light of these basic characteristics of the statutory framework, as described more fully in subsection (2) below, that the constitutionality of denying a natural father like Mr. Caban, on the facts and circumstances of his case, the right afforded to all other parents to block a non-consensual adoption must ultimately be measured, and it is clear that the challenged provisions are unconstitutional as applied to this case.

ARGUMENT

DOMESTIC RELATIONS LAW SECTION 111 IS UNCONSTITUTIONAL AS APPLIED TO DENY UNWED FATHERS THE SAME RIGHT TO PREVENT THE ADOPTION OF THEIR CHILDREN AFFORDED TO ALL OTHER PARENTS, ESPECIALLY IN LIGHT OF OTHER FEATURES OF THE NEW YORK STATUTORY SYSTEM WHICH ASSURE THAT, IN ALL DETERMINATIONS INVOLVING THE CHILD'S WELFARE, HIS/HER BEST INTEREST CONTROLS AND IN LIGHT OF THE ABSENCE OF ANY COUNTERVAILING INTEREST WHICH JUSTIFIES THE VIOLATION OF FUNDAMENTAL RIGHTS OF UNWED FATHERS.

1. Section 111 of New York's Domestic Relations Law Is Violative of the Basic Due Process and Equal Protection Rights of Unmarried Fathers.

The starting point of the constitutional analysis in this case is the bedrock principle, established beyond dispute by a long and unbroken line of this Court's decisions, that the privacy and integrity of the relationship between the natural parent and his/her child is a fundamental liberty interest

entitled to the utmost constitutional protection:

> The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, 262 U.S. 390, 399, 67 L.Ed. 1042, 1045, 43 S.Ct. 625, 29 ALR 1446 (1923), "basic civil rights of man," Skinner v. Oklahoma, 316 U.S. 535, 541, 86 L.Ed. 1665, 1660, 62 S.Ct. 1110 (1942), and "[r]ights far more precious ... than property rights," May v. Anderson, 345 U.S. 528, 533, 97 L.Ed. 1221, 1226, 73 S.Ct. 840 (1953). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince V. Massachusetts, 321 U.S. 158, 166, 88 L.Ed. 645, 652, 64 S.Ct. 438 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, Meyer v. Nebraska, supra, at 399, 67 L.Ed. 1045, the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, supra, at 541, 86 L.Ed. at 1660, and the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 496, 14 L.Ed.2d 510, 522, 85 S.Ct. 1678 (1965) (Goldberg, J., concurring).

Stanley v. Illinois, 405 U.S. 645, 651 (1972). In Stanley, this Court held that the right of a natural father, married or unmarried, to the care,

custody and companionship of his children is entitled to both procedural and substantive protection under the Due Process Clause of the Fourteenth Amendment, and that the state may not deprive him of his children without affording him notice and an opportunity to be heard, and without establishing that he is unfit to retain their custody. See also, Armstrong v. Manzo, 380 U.S. 545 (1965); Smith v. OFFER, 431 U.S. 816, 53 L.Ed.2d 14, 33-34 (1977); Moore v. East Cleveland, 431 U.S. 494, 52 L.Ed.2d 531, 537-538.

Stanley involved the issue of custody of children, but procedural and substantive guidelines at least as stringent as those articulated therein must be applied when the permanent severance of all connecting links between parent and child are at stake. See, Rothstein v. Lutheran Social Services, 405 US 1051 (1972); see

also, Alsager v. District Court of Polk County, 406 F.Supp. 10 (S.D. Iowa 1975), aff'd 545 F.2d 1137 (8th Cir. 1976) (termination of parental rights without showing of "actual or imminent harm to the children" in their natural home violated substantive due process); Roe v. Conn. 417 F.Supp. 769 (M.D. Ala. 1976) (the state's interest "would become compelling enough to sever entirely the parent-child relationship only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing").

While New York State has apparently acknowledged the fundamental nature of the interests at stake in an adoption proceeding with respect to most natural parents,[6] the unwed natural father is

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6. Amicus does not concede, but assumes arguendo, for purposes of this appeal, that the definitions of "abandonment" and other forms of "unfitness" contained in DRL § 111 and SSL § 384-b described infra at p. 40 are sufficiently precise and the

inexplicably relegated to an inferior status. The notice and hearing he is provided are virtually meaningless, since his right to a continued relationship with his children may be terminated regardless of the nature of his past or current involvement with them,[7] purely on the basis of the subjective determination of the children's best interest made by the individual judge,[8] and since an

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conduct prescribed therein sufficiently grave, to pass constitutional muster as grounds upon which to base the termination of parental rights.

7. In this case, appellant was actually spending every Sunday with his children until the week before the adoption order was entered.

8. "[J]udges ... may find it difficult, in utilizing vague standards like 'the best interests of the child,' to avoid decisions resting on subjective values." Smith v. OFFER, supra, 53 L.Ed.2d 14, 29 n. 36.

adoption may well be approved without an inquiry into the father's capabilities as a parent, much less a showing of his unfitness. Indeed, this is precisely how the statute operated in the instant case. While the new provisions requiring a hearing for unwed fathers were not in effect at the time of the trial, the Court below, consistent with the practice of other courts in the state at that time, did afford Mr. Caban an opportunity to be heard on the best interests of the children. However, in the trial court's view, a "best interests" hearing did not involve an examination of Mr. Caban's interest in and love for the children, nor his fitness and desire to continue his relationship with them, but rather, only a chance for Mr. Caban to provide any information he might have on the Mohammed's marriage and family life.

The failure of the New York statute to afford an unwed father the same right to block the adoption of his children available to all parents constitutes an extreme and unmitigated deprivation of his primary due process right to the preservation of the integrity of his familial relationships. Moreover, this disparate treatment of the unwed father's parental rights, vis-a-vis those of any other parent in the same factual context is indisputably an arbitrary and irrational discrimination based solely on sex and marital status which cannot pass constitutional muster under the equal protection analysis this Court has applied to gender or illegitimacy-based classifications.

This Court has been especially critical of statutory classifications based on gender or illegitimacy. In Trimble v. Gordon, 430 U.S. 762,

52 L.Ed.2d 31, (1977) an Illinois statute allowing illegitimate children to inherit by intestate succession only from their mothers was struck down on equal protection grounds. The Court concluded that statutory classifications based on illegitimacy must henceforth be "examined ... more critically" for the strength of their relationship to legitimate and actual state purposes," 52 L.Ed.2d at 37, 43 n. 17. The New York adoption statute, insofar as it affords a lesser degree of protection to familial relationships between all illegitimate children and their fathers than is extended to other parent-child relationships, cannot withstand such scrutiny. There is no nexus between the marital status of the parent and the gravity of the deprivation suffered by the family when it is dismembered by an adoption order. A statute which

presumes that all illegitimate children are in need of alternate fathers, simply because their mother consents, or has her own parental rights terminated, sweeps too broadly to satisfy the test in Trimble or this Court's previous decisions in this area.[9]

DRL § 111 also constitutes unconstitutional sex discrimination, since it irrationally discriminates to an extreme degree against fathers who are not married to their children's mother while affording unwed mothers the full panoply of procedural and substantive safeguards against unwarranted termination of their parental rights. There is no principled distinction between the interests of unmarried mothers and of unmarried fathers in the integrity

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9 See, e.g., Jiminez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Casualty & Insurance Co., 406 U.S. 164 (1972).

and privacy of the family relationship, and the statute clearly must fall on this ground as well. The standard applicable to gender-based classifications was recently enunciated by this Court in Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397, 407 (1977):

> To withstand constitutional challenge previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.

The unequal treatment of the parental rights of male and female parents in the adoption context cannot be shown to serve any important governmental objective; indeed, to the extent that it breaks up the bonds between fathers and their children, the statute contradicts the underlying goal of all New York's child care legislation, i.e. fostering positive relationships between children and their natural families.

Statutes embodying unjustified and outmoded stereotypes concerning the roles of men and women in child-rearing and family life have repeatedly been struck down by this Court[10] and the discrimination and illogic of the 'maternal preference' in child custody determinations has long been cast aside by New York law, which now view requests for custody by both parents on equal footing.[11] There is no reasoned basis for continuing to apply a maternal preference in the adoption context.

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10. Cf.: Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S.677 (1973).

11. See, e.g. Chavez v. Chavez, 53 AD 2d 593 (1st Dept. 1976); Hechemy v. Hechemy, 82 Misc.2d 79 (S.Ct., Albany Cty 1975); People ex rel Watts v. Watts, 77 Misc.2d 178 (Fam. Ct., NY Cty 1973); Stone v. Chip, 68 Misc.2d 134 (Fam. Ct., NY Cty. 1971).

2. The New York Statute's Anomalous Disregard of the Rights of Unmarried Fathers is Not Justified by Any Compelling Countervailing Interest.

The constitutional shortcomings of DRL § 111 are particularly intolerable because their harsh and unjust effects upon unwed fathers such as Mr. Caban and their children are not justified by any strong countervailing interest or policy. As will be demonstrated, the Caban children will gain little from an adoption, and the interest of the State as parens patriae in protecting their health and welfare is amply met by other statutory provisions which ensure that unwed fathers and other parents whose attachments to their children do not merit deference will be prevented from obstructing their children's growth and development. Thus, affording fit unwed fathers the opportunity to prevent their children's adoption will bring New York's adoption statute into con-

formity with basic constitutional principles of due process and equal protection without jeopardizing the strong and proper public policies which the New York child care system is designed to serve.

A. Adoption constitutes the permanent, final severance of the unwed father's familial ties with his children.

The permanent and harsh effect of adoption upon the unwed father's interest in his relationship to his own child cannot be overemphasized. An order of adoption, by definition, always involves complete replacement of a parent by a third party:

> Effect of Adoption. After the making of an order of adoption the natural parent of the adopted child shall be relieved of all parental duties toward and all responsibilities for and shall have no rights over such adopted child or to his property by descent or succession, except as hereinafter stated.
>
> The adoptive parents or parent and the adoptive child shall sustain toward each other the legal relation of parent and child and shall have all the rights and be

> subject to all the duties of that relation, including the rights of inheritance from and through each other and the natural and adopted kindred of the adoptive parents or parent. DRL § 117.

An adopted child is issued a new birth certificate, in which the name of the adoptive parent is substituted for the name of the natural parent (Public Health Law § 4138), the rights of intestate succession through the natural parent are terminated (DRL § 117), the child's surname is changed to that of the adoptive parent (DRL § 114), and the adoptive parent assumes full legal responsibility and authority for the child's care and support (DRL § 110). The displaced natural parent is effectively relegated to the status of a total stranger to the child. While as a natural parent, he is presumptively entitled to custody of his children as against a non-parent, absent a showing of extraordinary circumstances such as surrender,

abandonment, persisting neglect or unfitness, Bennett v. Jeffreys, 40 N.Y. 2d 543 (1976), adoption divests him of even the right to visitation,[12] and he is faced with the heavy burden of rebutting the new, adoptive parent's presumptive right to custody. Yet, as the facts of this case poignantly demonstrate, the effect of the permanent termination of the father's rights and obligations vis-a-vis children with whom he has a long-standing, durable and caring relationship are often no less tragic and traumatic for both parent and child than in the break-up of a more formalized family unit.

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12. In very rare cases, a natural parent has been granted visitation with the natural child after the child has been adopted, but only where the adoptive parent(s) have consented. See, Matter of Raana Beth, 78 Misc.2d 105 (Surr. Ct. N.Y. Co. 1974); Matter of Benjamin, N.Y.L.J. 4/4/78, p. 7 col. 2 (Surr. Ct. N.Y. Co.).

David and Denise Caban know and relate to their paternal relatives; they have spent a substantial amount of time with their paternal grandparents and are totally familiar with their background and heritage. Now, one-half their heritage, their extended family, is to be abruptly taken from them and artificially replaced with that of their step-father. The pattern of their childhood is to be totally altered. Their ability to see their father becomes dependent upon the opinion, or whim, of mother and step-father, and they lose any realistic opportunity to know and become a part of Mr. Caban's new family with his wife and her children. In cases such as this, adoption cannot completely destroy the connection between children and their background, and an attempt to do so may create confusion, feelings of rejection, and severe psychological trauma for the child. The gravity of the deprivation and

emotional turmoil imposed upon Mr. Caban himself cannot be overestimated. Despite the fact that he has shouldered far greater responsibilities for the care and supervision of his children than have many married, separated or divorced fathers, his familial bonds were afforded only the most cursory recognition in the adoption proceedings. While in the past he has been visiting David and Denise regularly, he can no longer see them; his chances of ever regaining their custody are realistically foreclosed; he must stand helplessly by as their names are changed and their links to their paternal family are totally erased.

B. The incremental benefits for the children and their mother of the children's adoption by the family which has their custody are not substantial, and their interests will not be significantly impaired by the capacity of the unwed father to block the adoption.

As this case illustrates, the positive implications of adoption for the children and their mother are minimal when compared

to the drastic consequences for the objecting natural father. Allowing the unwed father to block an adoption will not shift the focus of decisions concerning concrete issues of child-rearing away from the children's welfare, but will simply make it possible for a concerned and caring father such as Mr. Caban to play a role in his children's future.

If Mr. Caban were able to avoid the adoption of his children by withholding his consent, no practical changes in David's or Denise's living situation would necessarily come about, if their best interests would be served by maintaining current arrangements. The Caban children have now been living with their mother and stepfather for approximately 2 1/2 years; a veto of adoption would merely entitle Mr. Caban to attempt to obtain custody if it would be in the children's best

interests.[13] Nor would he be permitted to continue to exercise visitation rights with his children if it could be shown that visitation is unduly disruptive or upsetting to the children.[14] In short, the veto of adoption assures that such decisions are made in the children's best interests, not by fiat of mother and stepfather. It is true that after adoption

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13. In New York, neither parent has a presumptive right to custody of children in the event of a conflict; rather, "the Court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly." DRL § 70. This statute has been construed to afford equal standing to both parents of an out-of-wedlock child, and where the facts so indicate, custody will be awarded to the unwed father. See, e.g., Matter of Hilchuk v. Grossman, 57 A.D.2d 798 (1st Dept. 1977); Matter of Boatright v. Otero, 91 Misc.2d 653 (Fam. Ct. Onondaga Cty. 1977). As against a third party, however, an unwed father thus has a superior right to custody, in the absence of extraordinary circumstances warranting his displacement. See, e.g., Raysor v. Gabbey, 57 A.D.2d 437 (4th Dept. 1977).

14. (footnote on next page)

a step-father assumes the full support obligations of parenthood, but the appellee herein has been regularly supporting his step-children and obviously does not require the compulsion of a court order to continue to do so. The adoption order also enables the children to inherit through their step-father's family, but it does not appear that this right is more valuable than the right of inheritance through the Caban family which is lost by adoption. The adoption order therefore terminates Mr. Caban's obligations to provide support for the children,[15]

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14. New York courts have severely restricted or completely eliminated visitation between fathers and their children upon a showing of serious harm to the children caused by the visits. See, e.g., Petraglia v. Petraglia, 56 A.D.2d 923 (2d Dept. 1977); People ex rel Sanger v. Sanger, 55 A.D.2d 578 (1st Dept. 1976).

15. Family Court Act § 513 provides that: "Each parent of a child born out of wedlock is liable for the necessary support and edu-

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without appreciably changing the nature of their financial status vis-a-vis their step-father.[16]

Indeed, all that is to be gained by an adoption order in this case is the legal, formal acknowledgement of a relationship appellees contend already exists. The desire for such recognition is probably more keenly felt by appellees than by the children,[17] and any marginal interest

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cation of the child and for the child's funeral expenses." While the children's mother in this case has never sought support from Mr. Caban, she would remain free to do so if there were no adoption.

16. At any rate, a step-parent does have a qualified obligation of support, even in the absence of adoption. See, FCA §§ 415 & 455, which require a step-parent to support step-children under age 21 who are recipients of, or about to receive, public assistance.

17. The record does not indicate the desires of David and Denise were ever even considered by the court below as a relevant factor in its decision. It did not, for example, appoint a Guardian ad Litem to represent the children's interests. See, Surr. Ct. Procedures Act §§ 403 & 403-a. If it could be established

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they may have in the stability and security of an adoption contrasts sharply with the devastating impact upon Mr. Caban of losing all connections with his offspring.[18] Mr. Caban's veto would maintain a parity between himself and the children's mother respecting the right to seek custody and supervisory authority over the children. Thus, the custody proceeding which was pending in Family Court when the adoption petitions herein were filed would continue, and

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that the incidents of parenthood, such as a different surname from their mother, caused distress or anxiety for the children, even this could be changed without terminating parental rights. See, e.g., Matter of Williams, 86 Misc.2d 87 (Civ. Ct. Queens Cty. 1976).

18. Cf. Smith v. OFFER, 431 U.S. 816, 53 L.Ed.2d 14, 36-37 (1977).

it might well be decided in that forum that custody of the children should be awarded to their father. In any event, the determination would be based solely upon

> the children's health and well-being and the award therein could not be subsequently modified without a showing of changed circumstances, and the children's best interests.[19]

C. Statutory provisions for termination of parental rights and waiver of parental consent would prevent natural parents with no substantial interest in their children from preventing appropriate adoptions.

Affording unwed fathers the same power to block adoptions of their children available to all other parents will not hinder adoption in those cases where the natural father's ties to and interest in his children are highly attenuated,

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19. See, e.g., Matter of Ebert v. Ebert, 38 N.Y.2d 700 (1976); Matter of "CC" v. "CC", 37 A.D.2d 657 (3rd Dept. 1971).

since the legislature has anticipated those situations by allowing parental rights to be terminated and consent waived upon a showing of abandonment or unfitness. Given the liberal construction the New York courts have accorded to the definitions of "abandonment,"[20] "permanent neglect,"[21] and other grounds for disqualifying a parent from the veto right,[22] it is highly unlikely that any parent without long-standing and deep attachments to his children will be permitted to block their adoption. These provisions, currently applicable to all other parents, married or unmarried, male or female, effectively address most, if not all, the concerns voiced by the New York Court of Appeals, when it rejected a constitutional challenge to the statute here in question in Matter of Malpica-Orsini, 36 N.Y.2d 568 (1975), app. dismissed, sub nom, Orsini v. Blasi,

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20. "Abandonment" is defined as "failure for a period of 6 months to visit the child and communicate with the child or persons having legal custody of the child, although able to do so." DRL § 111(2)(a).

Prior to January 1, 1977, the statute did not contain a definition of abandonment, but the courts generally applied a test of whether the parent had evinced an intent to forego his or her parental rights and obligations. While early case law indicates the courts were extremely reluctant to find abandonment, the trend in recent years has been to construe "abandonment" liberally, consistent with a policy of freeing as many children as possible for adoption. Cf. Matter of Bistany, 239 N.Y. 19 (1924), with Matter of Anonymous, 40 N.Y.2d 96 (1976); Matter of Malik, 40 N.Y.2d 840 (1976); In re K.W.V., 92 Misc. 2d 292 (Sur. Ct. N.Y. Cty. 1977). Moreover, the legislature has consistently reacted to narrow interpretations of 'abandonment' by the courts by amending the statute to allow parental consent to adoption to be more easily dispensed with. For example, in response to cases refusing to find abandonment when even a 'flicker of interest' in the child by the parent remained, Susan W. v. Talbot G., 34 N.Y.2d 76 (1974), the legislature added a provision to the effect that evidence of infrequent or insubstantial contact by the parent with the child does not preclude a finding of abandonment. DRL § 111(6)(b), added by L. 1975 c. 704; L. 1976 c. 666. See generally, Final Report to the New York State Dept. of Social Services, Title IV-D, Research & Demonstration Project: Barriers to the Freeing of Children for Adoption,

March 1976 (Final Report), pp. 10-14.

21. See, e.g., Matter of Orlando F., 40 N.Y.2d 103 (1976);

22. These include: (1) deprivation of civil rights pursuant to the Civil Rights Law -- i.e., imprisonment; (2) mental illness or mental retardation; (3) a previous order terminating parental rights pursuant to Social Services Law § 384-b. DRL § 111 (2)(b)-(e). All of these were grounds for dispensing with parental consent to an adoption under the pre-1977 version of the statute, as well as 'habitual drunkenness' or 'judicially declared child abuse or neglect'.

The provision dispensing with consent of a parent who has been deprived of civil rights is currently under constitutional challenge in Thayer v. Donahoe (N.D.N.Y. 77 Civ. 380).

423 U.S. 1042 (1972). In Malpica, the majority of the court predicted that vesting a right of veto in unwed fathers would deprive homeless children of homes, create burden and expense in locating putative fathers, and lead to abuse of the consent requirement for personal revenge or financial gain. Malpica, supra, at 572-3. It is difficult to see how a truly malevolent, or irresponsible parent would be permitted to block adoption of his children under the New York system, since such a parent would undoubtedly be proved to have abandoned or neglected his children.[23] The

23. Two different methods are available to effectuate an adoption in New York. The adoption may be arranged through a child care and adoption agency, referred to as an "authorized agency." See, DRL §§ 112 & 113. Such "agency adoptions" generally involve children who have been either intentionally surrendered for adoption by a parent who cannot care for them (SSL § 384) or committed to the legal custody of the agency in a judicial proceeding pursuant to Social Services Law § 384-b,

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in which their parent's rights to them have been terminated because they have been abandoned or neglected, or because their parent is otherwise unfit to care for them. Adoptions which are arranged without the assistance of an authorized agency are known as "private placement adoptions." DRL § 109(5). While a private placement adoption may, like an agency adoption, provide a needy child with an entirely new set of unrelated parents, the vast majority are adoptions of children by the spouse of one of the natural parents, or by other relatives who had their custody.

Generally, the grounds for terminating parental rights prior to an agency adoption are identical to those for dispensing with parental consent to a private placement adoption, as set forth in DRL § 111. However, only an authorized agency or licensed foster parent may commence a proceeding to terminate parental rights, and the grounds of "permanent neglect," SSL § 384-b(4)(d), are not available to dispense with consent in a private placement adoption. For this reason, abandonment has been defined more broadly and is intended to be more easily established in the private placement context. See, Final Report, supra, at p. 45-46

The definitions of abandonment and unfitness justifying termination of parental rights and waiver of consent to adoption have recently been comprehensively re-drafted by the New York State Legislature for the express purpose of facilitating the freeing of more children for adoption. See, Final Report, supra, at pp. i-xviii

contention that the requirement of locating the unwed father and seeking his consent will discourage adoption has largely been mooted, since notice to putative fathers of an adoption proceeding has already been incorporated into DRL § 111-a. Finally, since, as described, infra, immediate issues concerning the children's daily surroundings and circumstances are in any event resolved with paramount emphasis upon their own best interests, a father who is unsuitable will not be permitted access to his children, even if his rights are not permanently severed by adoption.

That the forebodings of the court in Malpica were exaggerated is manifested by the posture of this case.[24] There was no difficulty in locating Mr. Caban, who

24. As indicated later in this brief, Malpica is fundamentally distinguishable from the instant case on the facts.

has been fully aware of and an active participant in all proceedings affecting his children from the outset. There has never been any doubt about his paternity.[25] Nor is there the slightest

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25. Despite a few indications of uncertainty in the testimony of Maria Mohammed, there is no real dispute that David and Denise are Mr. Caban's children, and the trial court assumed this to be a fact. In cases where paternity is disputed, a hearing would be necessary to determine whether, and to whom, the right to veto adoption attaches. Twenty-five states have anticipated and addressed this potential problem in that they require some showing of paternity -- i.e., formal acknowledgement, judicial declaration, proof of support or residence with the child -- before the right to grant or withhold consent to adoption is extended to an unmarried father. Ala. Code 26-10-3 (1958); Ariz. Rev. Stat. Ann. § 8-106 (Supp. 1976); Ark. Stat. Ann. § 56-106 (1971); Cal. Civ. Code § 224 (Supp. 1975); Colo. Rev. Stat. Ann. § 19-1-103 (1973); Conn. Gen. State Rev. § 45-61 (Supp. 1974); Del. Code Ann. Tit. 13, § 908 (Supp. 1974); D.C. Code Ency. 16-304 (Supp. 1976); Fla. Stat. Ann. § 63.081 (Supp. 1977); Ga. Code Ann. 74-103 (1973); Ind. Ann. Sta. 31-3-1-6 (Supp. 1977); Iowa Code Ann. § 600.17 (Supp. 1977); Ky. Rev. Stat. Ann. § 199.500 (1969); Minn. Stat. Ann. § 259.24 (Supp. 1974); Mont. Rev. Codes Ann. § 61-205 (Supp. 1975); Mich. Comp. Law Ann. § 710.28-39 (Supp. 1974);

(footnote continued on next page)

Nev. Rev. Stat. § 127.040 (1967); N.C. Gen. Stat. § 48-6 (Supp. 1977); Ohio Rev.Code Ann. § 3107.06 (Supp. 1977); R.I. Gen. Laws Ann. § 15-7-5 (Supp. 1977); S.C. Code Ann. § 15-45-70 (Supp. 1977); S.D. Compiled Laws Ann. § 25-6-4 (Supp. 1973); Utah Code Ann. § 78-30-4 (Supp. 1973); Va. Code Ann. § 63.1-225 (Supp. 1974); Wash. Rev. Code Ann. § 26.32.030 (Supp. 1975).

suggestion in the record that Mr. Caban's persistence in maintaining his parental relationships with his children is motivated by anything other than his devotion and love for them. In fact, he continues to seek their custody and has gone to the tremendous expense of purchasing a home for them to share as part of an ongoing family unit. That a father such as Mr. Caban could block the adoption of his children should not be a cause for alarm or regret, but rather, should be seen in the context of the entire child care system, as furthering its goal of encouraging and protecting positive, nurturing relationships between parent and child.

3. As Applied to the Facts of This Case, DRL § 111 Must Be Invalidated.

The constitutional infirmities of New York's adoption statute, as applied to deny unmarried fathers the same right to block their children's adoption as is afforded to all other parents, are compellingly manifested by the facts of the instant case. There can be no doubt that by permitting the adoption of David and Denise Caban to proceed over Mr. Caban's objections, the trial court impermissibly trammelled upon a father's substantial, constitutionally protected interest in his relationship with his children. Further, the extent and nature of Mr. Caban's involvement in his children's up-bringing belies the validity of the disparaging stereotypes concerning unwed fathers upon which their unequal treatment in the adoption process is premised.

On the basis of the record below, there could not possibly have been a

finding of abandonment or unfitness against Mr. Caban, as those terms are defined by statute;[26] the Court did not purport to make any such finding. Quite the contrary, the evidence adduced at trial clearly established that Mr. Caban had maintained continuous, active involvement in the care and supervision of his children from their births, and that his parental ties to them consisted of more than the mere fact of paternity. David and Denise Caban both lived with their father through the first, formative years of their lives. Even after their parents' separation, they never lost contact with their father who had weekend visits with them in the same way as would a divorced or separated father with

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26. See infra at p. 41 n 20 & 21.

an active interest in his children. When he became convinced that the children would be better off in his care than in Puerto Rico with their grandmother, Mr. Caban took them into his home and has ever since sought to maintain full legal and actual custody of the children. He is regularly employed, has a wife and step-children who are anxious to accept David and Denise into their family, and was not shown to be in any way unprepared to continue to fulfill all the obligations of parenthood. Thus, there is no question that Mr. Caban has a cognizable, substantial interest of basic constitutional dimension in the maintenance of his subsisting relationship to his children. As described earlier in this brief, the preservation of these ties would not in any way jeopardize the correspondingly strong interests of the children's mother, nor the best interests of the children.

There is simply no countervailing interest or public policy to be furthered by this adoption,[27] which justifies the drastic and irrevocable consequences imposed upon Mr. Caban.

While the court below accorded Mr. Caban's familial relationships only the most cursory acknowledgement, in contrast, the refusal of the children's mother to consent to Mr. and Mrs. Caban's cross-petitions for adoption was dispositive and those petitions were summarily dismissed. Both parents had maintained virtually indistinguishable relationships with their children, there was no finding that either had abandoned or neglected them, but, nonetheless, Mr. Caban's objections to the adoptions were overruled

27. The appellee step-father, of course, has no constitutionally protected interest in his step-children, and his concerns are amply protected by the rights of the children's mother.

and his parental rights terminated. Yet, if he had ever been married to Maria, the provisions of DRL § 111 would have precluded such a result, and Mr. Caban's status as David and Denise's father would have remained intact. It is difficult to see how this single change in Mr. Caban's legal status with respect to the children's mother would have made his relationship to David and Denise any stronger or more worthy of protection.

From all that can be discerned from the legislative history of the statute, the distinction made by DRL § 111 between married and unmarried fathers appears to be predicated upon an aversion to certain conduct considered immoral[28], or upon

28. Thus, the statute formerly stated that the consent to adoption was not required of a parent who had been divorced on grounds of adultery. This exclusion was eliminated by L.1974 c.842.

archaic, overbroad stereotypes concerning the behavior of unwed fathers, which are not supported in social science literature, empirical studies, statistical sources, or the facts of this case. These stereotypes portray every unwed father as an irresponsible man whose relationships with women are always casual and transitory and who inevitably abandons mother and child. From such a stereotype is derived the presumption that unwed fathers can never have close ties to their children, while unwed mothers and other fathers, including divorced and separated fathers, always do.

The literature indicates that most out-of-wedlock pregnancies result from exclusive, long-term relationships between mothers and fathers which are similar to the relationships of married or courting

couples in the general population.[29] The father of the child often wishes to marry, but the mother refuses.[30] Many fathers live with their illegitimate children.[31] Even fathers not living with their illegitimate children demonstrate genuine interest and concern for them, and assume the sociological functions of a parent, including the provision of financial and emotional support.[32] The invalidity of the presumption embodied in Section 111 that unwed fathers are less concerned with their children than are other fathers is illustrated by the juxtaposition of Mr. Caban's plight with the status of a divorced father who has had no contact whatsoever with his children. Regardless of the duration of the marriage, the amount of support provided, or indeed, whether the divorced father had even been made aware of the birth of a child, the child of such a father could not be adopted

(Footnotes on next page)

29. C. Bowerman, D. Irish, H. Pope, Unwed Motherhood: Personal and Social Consequences 97. Partial Report of Projects #006 and #189, Social Security Administration, Division of Research and Statistics, Institute for Research in Social Science, University of North Carolina, Chapel Hill, (1966), Unpublished (cited hereinafter as Bowerman, Irish & Pope), partially reported in Pope, "Unwed Mothers and Their Sex Partners," 29 Journal of Marriage and the Family 555, 558 (August, 1967), (cited hereinafter as Pope); Chaskel, "Un-Married Mother: Is She Different?" 46 Child Welfare 65, 72 (1967), (cited hereinafter as Chaskel); Herzog, "Some Notes About Unmarried Fathers," 45 Child Welfare 194 (April, 1966), (cited hereinafter as Herzog); Knight, "Conference for Pregnant Unwed Teenagers," 65 Journal of Nursing 126 (July, 1965), (cited hereinafter as Knight); New York Times, July 29, 1969, at 58, col. 1; M. Sauber and E. Rubinstein, Experiences Of The Unwed Mother As A Parent 27, Community Council of Greater New York (1965), (cited hereinafter as Sauber and Rubinstein), partially reported in Sauber, "The Role Of The Unmarried Father," 4 Welfare in Review 15, 16 (Nov. 1966), (cited hereinafter as Sauber).

Unwed parents constitute a cross-section of the population and represent all socio-economic class. Chaskel, supra, at 65. Unwed mothers and fathers generally have a similar education and socioeconomic status. Bowerman, Irish and Pope, supra, at 117, 120; Herzog, supra, at 194; R. Pannor. F. Massarik, B. Evans, The Unmarried Father 35 (1971), (cited hereinafter as Pannor, Massarik, and Evans); Pope, supra, at 560;

Vincent, "Unmarried Fathers," in Marriage and the Family in the Modern World 294, 297 (R. Cavan, ed., 1969), (cited hereinafter as Vincent); Wessel, "A Physician Looks At Services for Unmarried Parents," 49 Social Casework 11, 12 (1968), (cited hereinafter as Wessel). Age differentials between unwed mothers and fathers approximate husband and wife age differentials in the general population. Bowerman, Irish and Pope, supra, at 108, 120; P. Ewer, Final Report, HSMHA, Maternal and Child Health Care Service, Project H-214-2, Characteristics of AAPP Unwed Fathers - A Descriptive Study 13 (1971), (cited hereinafter as Ewer), (unpublished, obtained Division of Research, Maternal and Child Health Service, HSMHA, 5600 Fishers Lane, Room 12A-11, Rockville, Md. 20852); Pannor, Massarick and Evans, supra, at 560; Vincent, supra at 297. The unwed fathers generally live in the same locality as the mothers and have mutual associates with the mothers (Bowerman, Irish and Pope, supra, at 557), and are well acquainted with the mothers' families and peers. Bowerman, Irish and Pope, supra at 94; Pope, supra, at 557. Most unwed couples meet through friends or relatives or at school or work. Sauber and Rubinstein, supra, at 26; Sauber, supra, at 16.

Most unwed parents had been involved in exclusive, long-term relationships, Herzog, supra at 195; R. Roberts, The Unwed Mother, 228 (1970); Sauber, supra at 16; Sauber and Rubinstein, supra, at 26; during which time they were, or thought they were, "in love," Pope, supra at 560. The amount of concurrent, as well as serial promiscuity of the unwed parents was limited. Pope, supra at 562.

Finally, premarital sex in this society is not confined to unwed parents, but rather is prevalent in the general population. See Hunt, Sexual Behavior In The 1970's (1974) (reporting that 97% of males and 2/3 of females had premarital sex by age 25); Kinsey, Pomeroy, Martin and Gebhard, Sexual Behavior in the Human Female 286 (1953); Kinsey, Pomeroy, and Martin, Sexual Behavior In the Human Male 249 (1948); Vener and Stewart, "Adolescent Sexual Behavior In Middle America Revisited: 1970-1973," 36 Journal of Marriage and the Family 728 (1974).

30. Bowerman, Irish and Pope, supra, 131, 140; Herzog, supra, note 1, 194, 195; Knight, supra, 126.

31. An analysis of the 1960 and 1970 census figures indicates an increased proportion of families with own children under eighteen, headed by single male. U.S. Bureau of the Census, U.S. Census of the Population 1960 -- Vol. 1, Characteristics of the Population, Part 1 U.S. Summary, U.S. Government Printing Office, Washington D.C., 1964, Table 185; U.S. Bureau of the Census, U.S. Census of the Population 1970 -- Vol. 1, Characteristics of the Population, Part I, U.S. Summary - Section 2, U.S. Government Printing Office, Washington, D.C. 1973, Table 206. "Single parent" is defined as one who has never married and is not widowed, divorced or separated. U.S. Bureau of the Census, U.S. Census of the Population, Part I, U.S. Summary - Section 2, Appendix B, pp. App.-22. "Own child under eighteen" is defined as a never married son or daughter, by blood or adoption, Id., Appendix B. at 25. These figures indicate that in 1970, 14.3% of families headed by a single parent with own children under eighteen were

headed by male single parents, as compared to 11.8% in 1960, a 31.7% increase. Correspondingly, more children under eighteen living with single parents lived with their single fathers -- 13.9% in 1970, as opposed to 9.2% in 1960 -- a 37.5% increase.

Furthermore, the underlying statutory presumption that divorced and separated fathers always maintain close ties with their children (as opposed to the "absentee" illegitimate father) is rebutted by the census data. In 1970, only 8.8% of the children in divorced families and only 5.9% of the children in separated families lived with their fathers, as opposed to 13.9% of the children in single parent families. Correspondingly, 10% of the divorced families with own children and 7.4% of the separated families with own children as compared to 14.3% of the single families with own children, were headed by fathers.

32. Chaskel, "Changing Patterns In Services For Unmarried Parents," 49 Social Casework 3, 10 (1968); Ewer, supra, note 1, at 2 and Table 33 (between 59% and 83% of fathers of illegitimate children contributed money for their children's expenses and between 69% and 74% of fathers not living with their illegitimate children visited them); Knight, supra, note 1, at 126; Platts, "Agency's Approach to Natural Fathers," 47 Child Welfare 533, 537; Sauber, "Life Situations of Mothers Whose First Child Was Born Out Of Wedlock: A Follow-up After Six Years," Illegitimacy, Changing Services for Changing Times (1970), 40, 44, 45; Sauber, supra, note 1, at 17.

without the father's consent, unless the petitioning party met the burden of establishing a basis for dispensing with consent on one of the statutory grounds. But, despite the fact that he has borne far greater responsibilities for the care and supervision of his children than have many married, divorced, or separated fathers, Mr. Caban's ability to protect his familial ties against unwarranted termination is restricted, based solely upon presumptions about the competence of unwed fathers which disdain "present realities in deference to past formalities." Stanley, supra, at 657-58.

Nor is there any basis for according the children's mother any greater protection or deference as a parent than their father. Children form equally strong bonds with their fathers as with their mothers and paternal deprivation has a profound psychological effect on the child's self-concept, academic

achievement, and intellectual and moral development.[33] Both parents in this case shared joint custody of the children for approximately five years and each has subsequently had separate custody for relatively brief periods of time. There is nothing in the record to indicate that the children feel any less attachment to one or the other of their parents, yet solely because he is male, Mr. Caban can be supplanted as the children's father by their mother's new husband, who knew the children only a year when he was permitted to adopt them. Maria Mohammed, by consenting to this adoption and refusing consent to Mr. Caban's cross-petitions, is granted virtually complete authority over the future living circumstances and legal status of David and Denise, apparently on the basis of traditional, outworn notions of superior maternal capacity in the area of child care and custody.

(Footnote on next page)

33. H. Biller, Father, Child and Sex Role (1971); H. Biller, Paternal Deprivation (1974) Kotelchuck, Zelazo, Kagan, and Spelke, "Infant Reaction to Parental Separations When Left With Familiar and Unfamiliar Adults," 126 The Journal of Genetic Psychology 255 (June, 1975); M. Lamb, "The Development of Mother-Infant and Father-Infant Attachments in the Second Year of Life," 13 Developmental Psychology 637 (1977); M. Lamb, "Father-Infant and Mother-Infant Interaction in the First Year of Life," 48 Child Development 168 (1976); M. Lamb, The Role of the Father in Child Development (1976); D. Lynn, The Father: His Role in Child Development (1974); Ross, Kagan, and Zelazo, "Separation Protest in Infants in Home and Laboratory," 11 Developmental Psychology 256 (1975); Spelke, Zelazo, Kagan and Kotelchuck, "Father Interaction and Separation Protest," 9 Developmental Psychology 83 (1973).

This Court should not hesitate to reject a procedure manifesting such blatant disregard of the principles of due process and equal protection as is presented here. Orsini v. Blasi, 423 U.S. 1042 (1976), in which this Court dismissed the appeal of an earlier case involving a challenge to DRL § 111, and Quilloin v. Walcott, U.S. ___, 54 L.Ed.2d 511 (1978), in which it upheld the Georgia adoption statute's disparate treatment of unwed fathers, are readily distinguishable from the case at bar. In Orsini, the record on appeal consisted of a skeletal stipulation of facts in which it was agreed that the overall best interest of the children would be served by their adoption and which contained no facts concerning the extent or nature of the father's past or present relationship to his children. Thus, the Court was not presented with a record like this one, in which the interests of the unwed father and his

offspring in their familial, blood ties are clearly of constitutional dimension. Similarly, in Quilloin, the unwed father's interest in his children was far more attenuated than Mr. Caban's. The Court emphasized that Mr. Quilloin, who sought to veto the adoption of his son, had never lived with him, nor sought his custody, and thus, "had never shouldered any significant responsibility with respect to the daily supervision, education, protection or care of the child." Quilloin, supra, 54 L.Ed.2d at 520. In contrast, the adoptive father had known the child and maintained actual, physical custody of him, together with his mother, for a period of six years. Id. Additionally, it should be noted that the Georgia adoption statute provides at least some vehicle for an unwed father to gain rights in adoption proceedings equal to those of other parents

i.e., he can 'legitimate' the children, thereby acquiring the right to veto any adoption unless shown to be unfit. No such possibility is afforded to unwed fathers in New York State.[34] By carefully limiting its holding in Quilloin to the facts of the case before it, the Court did not address itself to the constitutional requirements mandated in a case such as this, where the natural father has "borne full responsibility for the rearing of his children" during the five-year period he resided together with them and their mother, and where the adoptive step-father has only maintained physical custody of the children with their mother during two brief periods of a few months at a time.

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34. See note, supra, at p. 45.

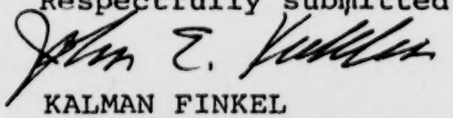
CONCLUSION

New York Domestic Relations Law Section 111, as applied to deny unwed fathers with substantial ties to their children the protections against unwarranted severance of their parental rights extended to all other parents, works an extreme and irrevocable deprivation which cannot be reconciled with either the due process or equal protection principles firmly established by this Court. By invalidating the challenged statute, this Court will restore the appropriate constitutional balance among the interests of parents, non-parents and children which otherwise prevails throughout the New York child care system. Therefore, it is respectfully

submitted that this Court should declare DRL § 111 unconstitutional as applied to appellant herein, and reverse the order of the New York Court of Appeals which is appealed from.

Dated: New York, New York
June 27, 1978

Respectfully submitted,



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* Attorneys for Amicus gratefully acknowledge the contribution made to this brief by Nancy Garber, a second-year law student at Benjamin J. Cardozo School of Law.

APPENDIX

Notice in certain proceedings to fathers of children born out-of-wedlock.

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons others than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who previously has been given notice of any proceeding involving the child, pursuant to section three hundred eighty-four-c of the social services law, and provided further that notice in an adoption proceeding, pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b.

In addition to such other requirements as may be applicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, purusant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

(3) The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interest of the child. DRL § 111-a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

77-6431

ABDIEL CABAN,

Appellant,

—against—

KAZIM MOHAMMID and MARIA MOHAMMID,

Appellees.

APPEAL FROM THE JUDGMENT AND ORDER OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF COMMUNITY ACTION FOR LEGAL SERVICES, INC.

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TABLE OF CONTENTS

MOTION FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE

Community Action for Legal Services, Inc. ("CALS") respectfully moves this Court pursuant to Supreme Court Rule 42(3) for leave to file the attached brief as amicus curiae.

The attorneys for all the parties to this appeal have been requested to consent to the filing of this brief and Counsel for both Appellant and Appellees have granted their consent.*

Community Action for Legal Services is the largest civil legal services program in the nation. Funded by the National Legal Services Corporation as successor to

*The letter(s) of consent have been filed with the Clerk of this Court. However, as of this moment the Assistant Attorney General on this case is away from his office and it has not been possible to reach him in order to request his consent.

the United States Office of Economic Opportunity (OEO) legal services program, CALS provides a full range of civil legal service to indigent New York City residents who cannot afford to pay a private attorney. Representation is provided in such diverse areas as housing law, the law of public assistance and other government benefits, consumer law, employment law, family, juvenile and education law. CALS has a full time staff of over 121 attorneys, based in 21 neighborhood offices, who provide legal assistance to more than 40,000 persons a year. CALS attorneys provide representation in all the trial courts of New York City, in the State and Federal Appellate Courts and in this Court.

Approximately 20% of the cases handled

by CALS' neighborhood legal services offices is in the area of family law. The case include matters of divorce, separation, child custody, visitation and support, child protective proceedings, foster care review proceedings, paternity proceedings, guardianship proceedings, proceedings for termination of parental rights and adoption proceedings. Many of CALS clients are fathers of children born out of wedlock. Such fathers regularly seek legal assistance in order to have their name listed on their child's birth certificate, to assert claims for visitation with or custody of their children, as respondents or petitioners in paternity and support proceedings, and as respondents in adoption and other proceedings for termination of parental rights. On the basis of their experience CALS attorneys have extensive knowledge

of the living patterns of poor families and the social and legal problems that confront them in their familial relationships.

Based upon its' experience, Amicus has maintained that family members, whether mothers, fathers, or children should not be discriminated against and penalized in their familial relationships solely on the basis of out of wedlock status or illegitimacy.

The nature of the right of an unmarried father to oppose the adoption of his children is obviously of great importance to the many unwed fathers who are CALS clients: Many are presently facing the loss of their children under substantially similar circumstances as those which faced Appellant Caban.

Accordingly, Amicus wishes to submit its brief because of its concern about the impact of this case on its clients and hopefully to

present to the Court an analysis of the issues which may not otherwise be presented.

Wherefore, Community Action for Legal Services request leave to file the attached brief amicus curiae.

Respectfully submitted,

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IN THE
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ABDIEL CABAN,

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-against-

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APPEAL FROM THE JUDGMENT AND
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BRIEF AMICUS CURIAE OF
COMMUNITY ACTION FOR LEGAL
SERVICES, INC.

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is set forth in the accompanying motion, supra.

STATEMENT OF THE CASE

This case comes to this Court by way of appeal pursuant to 28 U.S.C. §1275(2) from a judgment of the New York Court of Appeals, entered on November 17, 1977 and from two subsequent judgments and orders of said Court of Appeals, entered on January 10, 1978 and February 14, 1978 respectively. The last two judgments denied a motion for re-hearing and reargument of that Court's initial, November 17, 1977 judgment. By its judgment, reported as Matter of David A.C., 43 N.Y. 2d 708, 401 N.Y.S. 2d 208 (1977), the New York Court of Appeals dismissed as insubstantial an appeal

from an order of the Appellate Division of the Supreme Court of the State of New York, Second Department. The order of the Appellate Division reported as Matter of David Andrew C., 56 A.D. 2d 627, 391 N.Y.S. 2d 846 (1977), had affirmed the order of the Surrogates Court of the State of New York for Kings County which, on or about September 10, 1976,over the objections of Appellant Abdiel Caban, approved the adoption of his two children David and Denise by the Appellees, Kazim Mohammed and his wife Maria Mohammed, and simultaneously disapproved their adoption by Appellant Abdiel Caban and his wife Nina Caban.

Appellant Abdiel Caban is the unwed father of the children David and Denise.

Appellee Maria Mohammed, their mother bore his children out of wedlock. When the Surrogate's Court, Kings County approved the adoption of the children each parent was legally married to a new partner. Appellant Abdiel Caban had married one Nina Caban . Appellee Maria Mohammed had married Appellee Kazim Mohammed. In approving the adoption of the children by their mother and her new husband Kazim Mohammed and denying their adoption by appellant, their father, and his new wife, the Surrogate's Court relied on the provision of New York Domestic Relations Law §111,* Subdivision 3

*All references are to the statute as it existed prior to January 1, 1977. 14 McKinneys Consolidated Laws of New York, Annotated, copyright 1964, Cumulative Annual Pocket Part for use in 1976 - 1977, p. 51-52; McKinney's 1975 Session Laws of New York, Chapter 704, §3, p. 1117).

and on the interpretation of that statute by the New York Court of Appeals in Matter of Malpica-Orsini, 36 N.Y. 2d 568, 370 N.Y.S. 2d 511 (1975) appeal dismissed sub nom Orsini v. Blasi, 423 U.S. 1042, 46 L. Ed 2d 643 (1976).

Domestic Relations Law §111 prescribes whose consent is required before a child may be adopted. Domestic Relations Law §111, Subdivision 2 provides that in the case of a child born in wedlock the consent of the child's parents or surviving parent is required. However, the required parental consent may be dispensed with on the grounds of abandonment and other species of parental unfitness defined by Domestic Relations Law §111, Subdivision 4. In the case of a child born out of wedlock only the consent of the mother is required by Domestic Relations Law §111, Subdivision 3. Malpica-Orsini supra had held that the rights of an unwed father were appropriately

protected under the Fourteenth Amendment of the Constitution if he was given notice of his children's proposed adoption and an opportunity to be heard with respect to the children's "best interest."* The entry of an order of filiation pursuant to Article 5 of the Family Court Act does not affect an unwed father's legal position with relation to the adoption of his children pursuant to Domestic Relations Law §111, Subdivision 3: The father in Malpica-Orsini had had his paternity legally determined.

The following essential facts seem undisputed. Appellant Abdiel Caban and Appellee Maria Mohammed lived together unmarried for five years - from 1968 through 1973. Their two children David and Denise were born during this time (David was born in 1969, Denise in 1971). Appellant Caban's name appeared on the children's birth

*This requirement was subsequently codified by Domestic Relations Law §111-a.

certificate and the children bore his name. Appellee Maria Mohammed then used the name Caban and held herself out to be Appellant's wife. Neither she nor the Appellant ever sought a legal declaration of Appellant's paternity. However, in the adoption proceeding below the Surrogate's Court in its opinion and orders accepted him as the father of the children.

Until at least the end of 1973 Appellant Abdiel Caban and Appellee Maria Mohammed jointly provided a home and supported and raised their children. The Surrogate found that both had worked and both had contributed to the support of the children. (A-28). Early in 1974 Appellee Maria Mohammed, of her own choice, left Appellant Caban. Apparently, without warning she moved out of their apartment and took the children with her. She married Appellee Kazim

Mohammed in January 1974, but the fact of the marriage and her whereabouts were not known to Appellant until 1975. Despite the separation, Appellant Caban continued his relationship with his children; until September 1974 he saw the children and spent time with them every weekend.

In September, 1974 Appellee Maria Mohammed sent the children to Puerto Rico, where they lived with her mother and also visited and sometimes stayed with their paternal grandparents, the Cabans. In November, 1975, Appellant Caban went to Puerto Rico to visit his children and brought them back to New York City. He had married in the interim and wanted to care for the children in his home. The children lived with Appellant Caban until January 1976. During that month, Appellee Maria Mohammed commenced a custody proceeding against Appellant Caban. Custody of the children pendente lite was granted to the Appellee

mother, with visitation to the Appellant father. However, the custody proceeding was never tried, for it was rendered moot by the intervening adoption proceeding which is the subject of this appeal. Notice of the adoption proceeding was issued in February, 1976. Until September 1976, when the adoption order terminating his parental rights was entered, Appellant Caban continued to see his children at his home every week. With the entry of adoption order, Appellant Caban's relationship to his children came to an abrupt and complete stop.

In granting the adoption the Surrogate found neither that Appellant Caban had abandoned his children nor that he was not fit to be their father on any of the other grounds for dispensing with required parental consent to an adoption, spelled out by Domestic Relations Law §111, Subdivision 4. Moreover, the opinion of the Surrogate makes clear that in approving the adoption he gave no consideration what-

soever to Appellant Caban's fitness or unfitness as a father.

Acting in accordance with New York statutory authority and case law, the Surrogate Court below noted on the one hand that without the consent of the natural mother, the putative father has "no prospect of adopting the child" and on the other hand that the primary objective of allowing a putative father to be heard in opposition to the adoption by a step-father married to the natural mother

> "is not to determine the degree of his continued interest in the child but rather to determine the best interests of the child. Any evidence the putative father may have concerning the solidity of the marriage and the concern and treatment of the child in the new family is particularly relevant."
> (Opinion, Surrogate Sobel dated August 3, 1976, (Appellant's Appendix p. 28).*

*Hereinafter designated as "A"

As to the feelings of the children themselves, the Surrogate found that "the children are not old enough to be articulate; the oldest is able however to express "love" for both his fathers" (A-29).

It is clear that the Surrogate evaluated the best interest of Appellant Caban's children solely in terms of the fitness of Appellees and gave no consideration to the character of Appellant Caban or the relationship between him and his children. Thus the Surrogate concluded

> "There is absolutely no evidence, credible or otherwise, that the new marriage of the natural mother is other than solid or permanent; and no evidence whatsoever that the children are not well cared for and healthy. Nothing therefore justifies a denial of the petition other than that the putative father professes that he loves the children and fervently desires that they continue to bear his name. This is not enough, however sincerely motivated." (A-30).

Appellant Abdiel Caban argued before the Surrogate's Court and on subsequent appeals that adoption of his children without his consent solely on the basis of their mother's consent and consideration of "the best interest of the child" and automatic disapproval of his and his wife's application for adoption on the basis of the mother's veto denied him due process and equal protection of the laws under the Fourteenth Amendment. Probable jurisdiction was noted by this Court on May 15, 1978.

QUESTIONS PRESENTED

1. Whether New York Domestic Relations Law §111, (McKinney 1976) on its face and as applied violates the Due Process Clause of the Fourteenth Amendment in that it permits the adoption of children without requiring the consent of their unwed father without regard to his fitness but solely on the basis of a finding that the adoption is

"in the best interest of the child. "

2. Whether New York's Domestic Relations Law §111, (McKinneys 1976) on its face as applied violates the equal protection clause of the Fourteenth Amendment in that it permits the adoption of children without the consent of their unwed father but prohibits adoption of children without the consent of their married /divorced father or unwed mother.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is estimated that a third or more of children now growing up in America will at some point find their parents separating.* In over ninety percent of these instances, if present practice continues, their custody will be entrusted to their mothers.** The

*Bane, Mary Jo, Here to Stay: American Families in the Twentieth Century, New York Basic Books 1976)

**See People ex rel Watts v. Watts, __Misc. __ 2d, 350 N.Y.S. 2d 285 (1973).

role and rights of fathers separated from their children as a result of family breakup has been the subject of growing concern and comment as fathers find themselves pushed out of their children's lives. The problem of a continued relationship with their children confronts fathers whether or not the family unit of which they once were a part was the product of a legal marriage. This case calls into question the legal basis whereby the rights of an unmarried father to a relationship with his children may be abrogated and conferred in his stead on the man whom the children's mother subsequently chooses to marry.

This Court has properly recognized that the interest of an unwed father in

the children whom he has "sired and raised" Stanley v. Illinois, 405 U.S. 645, 651 (1972) is included among the fundamental familial rights protected under the First, Ninth and Fourteenth Amendments of the Constitution. The provisions and application of Domestic Relations Law §111 to permit the adoption of Appellant's children without his consent and without relationships to his functioning as a parent, solely on the basis of the consent of the children's mother and a finding that adoption by their stepfather was in their best interest, impermissibly deprived Appellant Caban of his substantive Due Process right to a relationship with his children.

New York has no compelling or important interest in severing the familial relationship between an unwed father and his children without regard to the father's

character and fitness as a parent and without considering whether his relationship to his children is harmful to them. The description of New York's interest in Matter of Malpica-Orsini, 36 N.Y. 2d 568, 370 N.Y.S. 2d 511 (1975) appeal dismissed sub nom Orsini v. Blasi, 423 U.S. 1042, 46 L. Ed 2d 643 (1976) is related primarily to administrative convenience, and a stereotypic portrayal of unwed fathers based on generalized speculation. New York has no interest in fostering adoption for its own sake for children who are not homeless and have meaningful ties to their unwed fathers. The "best interest of the child standard," the only standard considered in connection with the adoption of an unwed father's children, by its nature permits considerations of parental fitness and harm to children to be ignored. The "best interest of the child"

standard is vague, subjective, incapable of providing notice of the consequences of particular conduct and subject to arbitrary application. For all those reasons it is an impermissible standard for the termination of an unwed father's parental rights. Provisions such as those of Domestic Relations Law §111, Subdivision 4 can satisfy the State's interest in severing a destructive parent child relationship.

The permanent severance of the parent-child relationship for "slight" reasons also deprives children of a meaningful and important relationship with their father. The meaning and importance and the relationship persists even though the children and their father are living apart.

The disparate treatment of unwed fathers as opposed to married fathers and unwed mothers pursuant to New York Domestic Relations Law §111 also denies Appellant

Caban the equal protection of the laws. This discrimination on the basis of sex and illegitimacy without "relationship to individual responsibility" Frontiero v. Richardson, 411 U.S. 677, 686 (1973) permits children to be adopted or not adopted on an arbitrary basis.

POINT I

THE ADOPTION OF APPELLANT'S CHILDREN PURSUANT TO NEW YORK DOMESTIC RELATIONS LAW §111, ON ITS FACE AND AS APPLIED DENIED HIM DUE PROCESS AND EQUAL PROTECTION OF THE LAWS

Appellant Caban's status as father and relationship to his children David and Denise, whom he had "sired and raised" Stanley v. Illinois, 405 U.S. 645, 651 (1972) was permanently terminated when the Surrogates Court, Kings County, approved the children's adoption by their mother's new husband Kazim Mohammed. As a result

of the adoption all contact between Appellant and his children came to an end. In the Matter of Gerald G.G. __Misc. 2d__, __N.Y.S. 2d__ (1978).* The adoption of his children was approved without their father's consent because he fathered his children out of wedlock. Because of this fact, pursuant to state statute, his consent to the adoption of his children was not required, and the adoption could be opposed only pursuant to the state law standard of "the best interest of the child." As interpreted by the Surrogate below in this case, as well as in other New York decisions, Matter of Malpica-Orsini, supra, Matter of Gerald G.G., supra,a putative father's relationship to his children may be forever ended without any showing that the father is seriously disqualified from parenthood or that the children will suffer significant harm as a result of their continued relationship to him.

*New York Law Journal, April 28, 1978, p. 10

The opinion of the Surrogate shows (A 27-30) that Appellant's character and relationship to his children were treated as irrelevant to the adoption decision, which rested instead on the Court's approval of Appellee's marriage and finding that the children were well cared for by their mother and her new husband.

NATURE OF APPELLANT'S INTEREST

By the Surrogate's adoption order the State of New York deprived Appellant Caban of a fundamental liberty recognized by this Court as protected by the First, Ninth and Fourteenth Amendments. E.G. Meyer v. Nebraska, 262 U.S. 390 (1923); Prince v. Massachusetts, 321 U.S. 158 (1944); May v. Anderson, 345 U.S. 528 (1953), Armstrong v. Manzo, 390 U.S. 545 (1965); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972); Moore v. East Cleveland, 431 U.S. 494 (1977).

In Stanley v. Illinois, supra the Court admitted the relationship of an unwed father and his children to that "private realm of family life which the state cannot enter", Prince v. Massachusetts, 321U.S. 158, 166, holding that "the private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and absent a powerful countervailing interest, protection." Stanley v. Illinois, supra at 651.

Since then this Court has repeatedly noted that the legal status of families was not controlling in the assessment of familial rights under the Constitution, Smith v. Organization of Foster Families, 431 U.S. 816, fn 53 (1977) Quilloin v. Walcott, __U.S.__, 54 L. Ed., 2d 511 (1978). See also Rothstein v. Lutheran Social Services of Wisconsin, 405 U.S. 1051 (1972).

Amicus believes that the permanent severance of the parent-child relationship between Appellant Caban and his children without his consent under the standard utilized by the Surrogate's Court - the best interest of the child - is not consistent with their substantive due process right to their familial relationship, a right which this Court has stated

> "has its source not in state law, but in intrinsic human rights, as they have been understood in this nation's history and tradition." Smith v. Organization of Foster Families, 431 U.S. 816, (1977).

The termination of the parental relationships of the unwed father through the adoption of children is no less painful or significant a loss because prior to the adoption the children were not in the father's custody. This Court has recognized the value of the parent-child

relationship as "far more serious than property rights" in cases where parent and child had not been living together. May v. Anderson, 345 U.S. 528, 533 (1953); Armstrong v. Manzo, 390 U.S. 545 (1965). It would be too narrow and literal and impoverished an approach to human and familial relationships to suggest that the love, identification and concern of a father for his children can have sufficient value and meaning to merit constitutional deference only if father and children reside under the same roof.

Amicus believes that the severance of Appellant Caban's parental relationship to his children without his consent based solely on a finding that it is in the children's best interest, is not justified by any compelling or powerful state interest and that such interests as the state legitimately

possesses could be accomplished by less drastic means. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639, 647 (1974); Roe v. Wade, 410 U.S. 113 (1973); Moore v. East Cleveland, 431 U.S. 494 (1977).

INSUFFICIENCY OF STATE INTEREST

The purported interests of the State of New York in permitting the adoption of illegitimate children "in their best interest," but without their father's consent and without any showing that he is otherwise disqualified for parenthood were identified by the New York Court of Appeals in Matter of Malpica-Orsini, 36 N.Y.S. 2d 568, 370 N.Y.S. 2d 511 (1975). This was the decision relied on by the Court of Appeals in leaving the adoption of Appellant Caban's children undisturbed, Matter of David A.C., 43 N.Y. 2d 708, 401 N.Y.S. 2d 208 (1977).

The majority's analysis of state interest in Malpica-Orsini is striking in several respects: The discussion of state interest is

completely unrelated to the legal and human situation involved in that case, and, even more clearly presented by this case. The Court of Appeals considered New York's concern for the adoption of homeless foster children as a justification for curtailing the rights of unwed fathers whose children not only are not homeless, but, as in this case, have two suitable homes beckoning. Further, the Malpica-Orsini decision is written to suggest that if an unwed father's consent to the adoption of his children were required, any such father no matter how unconcerned, cruel and irresponsible would have absolute power to prevent the children's adoption.

It is not disputed that New York State has a legitimate interest in the welfare of children in general and of homeless foster children in particular. However, requiring the consent of unwed fathers to the adoption of their children will not jeopardize those interests. The Court of Appeals' assumptions about the effect of such a requirement on

the adoption of foster children are highly questionable.

The Court of Appeals,for example, was concerned with the difficulties of locating putative fathers,if their consent to an adoption were required. But, since the Court of Appeals acknowledged that the putative father must be given notice of the proposed adoption, the consent requirement would not make any difference. The requirement of notice,including notice of the consequences of failure to appear, now codified in Dom.Rel.Law &111-a and Soc.Serv.Law§384-c means that the effort to locate the father must be made in any event.*

*For a helpful discussion of the manner in which several states have dealt with the notice problem see Freeman, Remodelling Adoption Statutes after Stanley v. Illinois, Journal of Family Law, Volume 15,No.3,p.385. University of Louisville School of Law 1976-1977.Interestingly,a recent study of paternity and support proceedings in the N.Y. City Family Court found that most putative fathers readily acknowledged paternity and their support obligations. Who Should Support Children, Community Council of Greater New York,225 Park Avenue South, New York,NY10013 pp.64-65.

Further, as pointed out by Zent, Edmonds, Buttrey, Kaufman, in New York Civil Practice, Family Court Proceedings, Matthew Bender, New York 1976. Vol. 12B §40.2

> "Where the person whose consent would otherwise be required does not appear, or if he appears and contests, the issue then becomes whether he falls into one of the categories enabling the court to dispense with his consent.

The Court of Appeals was also concerned that putative fathers of foster children would harrass adoptive parents. But it is not clear why it is the unwed fathers who is especially likely to harrass. The New York State legislature is apparently unconcerned with the risk of harrassment, since it permits parents and foster parents to meet and know one another's identity in foster care review and custody proceedings, Social Services Law §383(3), §392, extension of placement proceedings, Family Court Act §1055 and in some instances

in proceedings for termination of parental rights, Social Services Law §384-b.3(a) and (b). Further New York Courts can deal with problems of harrassment, when they occur, by curtailing visitation - less drastic means than final termination of the parent-child relationship. De Biase v. Scheinberg, 47 A.D. 2d 657, 364 N.Y.S. 2d 34 (1975); Herb v. Herb, 8 A.D. 2d 419, 188 N.Y.S. 2d 41. Similarly, in its discussion of delays which the need for the consent of unwed fathers would create in the adoption process, the Court of Appeals never mentioned that there is a six months waiting period for the approval of adoption in New York Domestic Relations Law § 112(6).

The New York Court's speculation that requiring an unwed father's consent to the adoption of his child will lead to an increase in black market adoptions, like the question of harrassment, reveals the unyielding social prejudice which permeates

the Malpica-Orsini opinion. There is no factual basis for it.

The negative image of the unwed father in Malpica-Orsini bears no resemblance to the responsible and concerned unwed father in this case and in the many reported New York decisions involving unwed fathers and their children. E.G. Application of Virginia Norman, __Misc. 2d__, 205 N.Y.S. 2d 260, (1960); Loretta Z. v. Clinton A., 36 A.D. 2d 995, 320 N.Y.S. 2d 997; (1971); Raysor v. Gabbey, 57 A.D. 2d 437, 395 N.Y.S. 2d 290 (1977); Stone v. Chip, 68 Misc. 2d 134; 326 N.Y.S. 2d 520 (1971); Godinez v. Russo, 49 Misc. 2d 66, 266 N.Y.S. 2d 636 (1966); Cornell v. Hartley, 54 Misc. 2d 732, 283 N.Y.S. 2d 318 (1967); Pierce v. Yerkovich, 80 Misc. 2d 613, 363 N.Y.S. 2d 403 (1974); Boatright v. Otero, __Misc. 2d__ 339 N.Y.S. 2d 391 (1977); Anonymous v. Anonymous, 56 Misc. 2d 711, 289 N.Y.S. 2d 792 (1968). People ex rel Blake v. Charger 76 Misc. 2d 577, 351 N.Y.S. 2d 322.

In its assessment of unmarried fathers, the Court of Appeals adopted the same "Procedure by presumption" which was rejected by this Court in Stanley v. Illinois, 405 U.S. 645, 656 (1972).

Most important, in analyzing New York's interest in facilitating the adoption of foster children, the Court of Appeals in Malpica-Orsini, failed to acknowledge that proceedings for termination of parental rights exist to permit the adoption of foster children despite lack of consent from their parents, pursuant to S.S.L. §384-b.* Similarly, in private adoptions, Domestic Relations Law §111, Subdivision 4 provides grounds for dispensing with require parental consents to adoption. These statutes

*At the time of Malpica-Orsini predecessor statutes, Social Services Law §384 and Family Court Act, Article 6, Part 1, governed involuntary termination of parental rights.

provide bases for severing the parent-child relationship in cases of serious parental failure and serve the State's child protection interest.

In the case of foster children, grounds for termination of parental rights include abandonment, infrequent visitation, severe and incurable mental illness or retardation, as well as parental failure to make and attempt to carry out plans for the future discharge of the children from foster care. See S.S.L. §384-b.4,5,6 and 7. These recently revised provisions are powerful weapons the State of New York has developed in the interest of homeless foster children. See Matter of Orlando F., 40 N.Y. 2d 103, 396 N.Y.S. 2d 64 (1976); Matter of Bradley U., 55 A.D. 2d 722, 389 N.Y.S. 2d 431 (1976); Matter of Anthony L "CC", 48 A.D. 2d 415, 370 N.Y.S. 2d 219 (1975). Given the ability of the State of New York pursuant to statutory proceedings to terminate the parental rights

of uncaring, irresponsible or severely incapacitated parents of children in foster care, thus making the children available for adoption, there is no reasonable relationship between New York's legitimate interest in facilitating the adoption of homeless foster children and the indiscriminate disregard of the rights of unwed fathers expressed by Domestic Relations Law §111, Subdivision 3 and Malpica-Orsini, supra.

While New York's interest in finding permanent homes for homeless foster children is self-evident, the nature of New York's interest in facilitating adoption of illegitimate children by step-fathers, regardless of the fitness of the children's own fathers, is far from clear.

The Court of Appeals in Malpica-Orsini mentioned only two factors: One, was that difficulty in adoption of step children would discourage marriages. Like so much in the Malpica-Orsini case this argument is

based entirely on conjecture. Nor is there any showing that stepfather adoption will contribute to the stability of a marriage. More serious is the argument that step father adoption frees illegitimate children of "the cruel and undeserved out of wedlock stigma." 36 N.Y. 2d 572. Yet, the stigma of illegitimacy seems largely to be a thing of the past." "The notion that marriage and marital ties are essential to parenthood is on the decline . . . " Betty Yorburg, The Changing Family, Columbia University Press, 1973, p. 114. Not only has cohabitation without marriage become more respectable, but the high divorce and remarriage rates* mean that there are many children whose last name may be different from that of their remarried mother. Thus, children born out of wedlock do not have any special identifying characteristics. There was nothing about

*Bane, Here to Stay: American Families in the Twentieth Century pp. 29-34, Basic Books, 1976.

the Caban children's birth certificate that would reveal that they were illegitimate. See New York Public Health Law §4135. New York State's interest in the protection of children does not require that the interests of unwed fathers be slighted. Where an unwed father abandons his children or where his relationship to them is destructive, Domestic Relations Law §111, Subdivision 4 can be applied to dispense with his consent to a step father adoption as it is in the case of married fathers.*

*Domestic Relations Law §111, Subdivision 4 authorizes dispensing with the adoption consent of a parent who has abandoned a child, who has been deprived of civil rights. See Matter of Holly S.S. v. John S.S. 57 A.D. 2d 681, 393 N.Y.S. 2d 821 (1977); Matter of Carey L. v. Martin L., 55 A.D. 2d 717, 399 N.Y.S. 2d 428; In the Matter of Anonymous, 79 Misc. 2d 290, 359 N.Y.S. 2d 738 (1974).

New York may not prefer the state created status of adoption merely for its own sake, over constitutionally protected familial interests. New York already provides the unwed father with notice of the proposed adoption, and, if the father appears, with a hearing. New York's claims of administrative inconvenience and Appellees, no doubt short sighted, desire to have Appellant Caban out of their lives does not justify New York in providing Appellant unwed father with an "empty" hearing instead of a meaningful one.

Amicus submits that New York's interest in automatically dispensing with the consent of an unwed father to the adoption of his children is de minimis.

INSUFFICIENCY OF BEST INTEREST OF THE CHILD STANDARD

Both in Smith v. Organization of Foster Families, 431 U.S. 816 (1977) and in Quilloin v. Walcott, __U.S.__ 54 L. Ed 2d 511 (1978)

this Court suggested that abridgement of parental rights solely because it was "in the best interest of the child" and without a showing of parental unfitness would offend the Due Process Clause.

As this Court noted in Smith v. O.F.F.E.R., 431 U.S. 816, fn 36 (1977) "the best interest of the child" standard is vague. Lacking any defined meaning this standard gives no notice of the conduct, if any, that may lead to the adoption of children over their unwed fathers objections; nor does it provide a basis for fair and uniform application by judges. Further, there is no such thing as weight of evidence when "the best interest of the child" standard is applied. "Best interest of the child" has been subject to severe criticism by legal scholars. The standard has been described as inherently indeterminate.

> "The indeterminancy flows from our inability to predict accurately human behaviour and from a lack of a social consensus as to the values that should inform the

decision. Mnookin, Child Custody Adjudication, 39 Law & Contemporary Problems 226 at 264 (1975).

Prof. Mnookin found that the best interest standard allows judges to rely on personal values, left considerable scope for class bias and creates the unfair risk of retroactive application of a norm of which the parent will have had no notice. The best interest standard leads to arbitrariness in that:

> "The same case presented to different judges may easily result in different decisions. The use of an indeterminate standard means that state officials may decide on the basis of unarticulated (perhaps even unconscious) predictions and preferences that could be questioned if expressed." Id. at 263. See also Wald, State Intervention on Behalf of 'Neglected' Children, 28 Stanford Law Review. No. 4, p. 623 (April 1976) at 649.*

*A comparison of the Surrogate's opinion in this case with the opinion of the Appellate Division Second Department in Matter of Gerald G.G. N.Y. L.J. 4/28/78, p. 10 where opposite results were reached on similar facts illustrates the arbitrariness of the best interest test. In both cases father and mother had lived and cared for their children together and in both cases the father continued to maintain an active interest in the children after father and mother had separated. If anything Appellant Caban's relationship to his children was closer.

The best interest of the child standard also is constitutionally defective because it permits abridgement of fundamental parental rights without a showing of parental unfitness and consequent serious harm to the children. Absent such a showing the state may not abridge let alone permanently destroy a parent-child relationship. Meyer v. Nebraska, 262 U.S. 390 (1923); Stanley v. Illinois, 405 U.S. 645 (1972); Wisconsin v. Yoder, 406 U.S. 205 (1972). A number of lower Federal Courts have invalidated state statutes abridging familial rights because of the vagueness and inappropriateness of the standard used. Alsager v. District Court of Polk County Iowa 406 F. Supp. 10 (Iowa 1975) aff'd 545 F. 2d 1137 (8th Cir. 1976); Roe v. Conn., 417 F. Supp. p. 769 (Md. Ala 1976); Sims v. Texas Department of Public Welfare, 438 F. Supp. 1179 (Ed. D. Tex. 1977). In Roe v. Conn., the three judge Federal District Court stated:

> "Due process requires the state to clearly identify and define the evil

from which the child needs protection and to specify what parental conduct so contributes to that evil that the state is justified in terminating the parent-child relationship".417F.Supp.780

ADOPTION AND THE INTERESTS OF CHILDREN

The natural affinity of children for their father was acknowledged by this Court in Weber v. Aetna Casualty and Surety Co. 406 U.S. 164, 169 (1972) to be as great in the case of illegitimate as legitimate children. The routine disregard of the rights of unwed fathers in relation to the adoption of their children thus slights the interests of the children as well.

Not only do the children suffer the loss of a father they have loved and known, but the acquisition of a step father and adoptive status may well not compensate for the loss.

Studies of children whose parents separate or divorce show that the children value and want to continue their relationship with both

their parents.* Relationships between children and stepparents can be problematic.** - as readers of Cinderalla and Dickens' David Copperfield may recall. Finally child welfare and social work specialists, in response to lessons learned from movement of adoptees searching for their natural parents have begun to question the desirability of the complete rupture in relationships between natural parents and children which characterizes present adoption practice.

"Taking a child from one set of parents and placing him/her with another set, who pretend the child

*Kelly and Wallerstein, Part-Time Parent, Part-Time Child: Visiting After Divorce, Journal of Clinical Child Psychology, Vol. 6 No. 2, Summer 1977; Rosen, Children of Divorce, Vol. 6, No. 2, Summer 1977.

**Irene Fast and Albert C. Cain "The Stepparent Role: Potential for Disturbances in Family Functioning. American Journal of Orthopsychiatry, April 1966.

is born to them disrupts a basic natural process. The need to be connected with one's biological and historical past is an integral part of one's identity formation." *

DISCRIMINATION BETWEEN MARRIED OR DIVORCED FATHERS, UNWED MOTHERS AND UNWED FATHERS

Additionally, the disparate treatment pursuant to Domestic Relations Law §111, Subdivision 2 and 3 of married or divorced fathers as opposed to unwed fathers, and unwed mothers as opposed to unwed fathers, violates the Equal Protection Clause.

Pursuant to Domestic Relations Law §111, Subdivision 2,3 and 4, absent a showing of abandonment or other species of unfitness a child can't be adopted without the consent of its married or divorced father or unwed mother. In the same circumstances, the consent of the unwed father is not required. This difference in rights is substantial

*Sorosky, Baran, Pannor, The Adoption Triangle, p. 219, Anchor Doubleday, 1978.

"The right of active participation in presenting evidence and in making arguments with respect to the ultimate issue before the adoption court - the best interest of the child - is not at all the same. . . as requiring the consent of the father as a prerequisite to granting the adoption - in effect granting him not only a right of participation but a potential veto." (Dissenting Opinion) Malpica-Orsini, supra. 36 N.Y.S. 2d at 578.

Amicus believes that the previously presented discussion of state interest demonstrated that the treatment accorded to unwed fathers in relation to the adoption of their children by Domestic Relations Law §111 was not justified by any compelling or sufficiently important state interests. At the same time Appellant Caban's situation and that of an unmarried or divorced father, in relation to the adoption of his children by a third person, are essentially the same.

Parental rights and obligations of a legitimate and a putative father are virtually the same in the areas of custody, visitation

and support under New York law. In the case of a child of a marriage, the mother and father have an equal claim to custody and the non-custodial parent has the right of visitation, Domestic Relations Law §240; Hotze v. Hotze, 57 A.D. 2d 85, 394 N.Y.S. 2d 753 (1977). Domestic Relations Law §32 places primary responsibility for support on the father. See also F.C.A. §413. However, New York Courts are now viewing both legitimate mother and father as equally responsible for child support. Carter v. Carter, 58 App. Div. 2d 438, 398 N.Y.S. 2d 88 (App. Div. 2nd Dept. 1977); Tessler v. Siegel, 59 App. Div. 2d 846, 399 N.Y.S. 2d 218 (App. Div. 1st Dept. 1977). With respect to custody, New York Courts, long adhered to the rule that the mother has a superior right to custody of an illegitimate child as against the child's father. People ex rel Meredith v. Meredith,

272 App. Div. 79, 69 N.Y.S. 2d 462 (1947). More recent decisions reveal a trend toward deciding custody conflicts between unmarried parents as if the mother's and father's right to custody were equal. See Juan R. v. Necta V., 55 A.D. 2d 33, 389 N.Y.S. 2d 126 (App. Div. 1st Dept. 1976); Godinez v. Russo, 49 Misc. 2d 66, 266 N.Y.S. 2d 636 (1966); Stone v. Chip, 68 Misc. 2d 134, 326 N.Y.S. 2d 520 (1971). The right to custody of both unwed mother and father is treated as superior to that of "strangers" Raysor v. Gabbey, 57 A.D. 2d 437, 359 N.Y.S. 2d 290 (1977); People ex rel Blake v. Charger, 76 Misc. 2d 577, 351 N.Y.S. 2d 322; Boatright v. Otero, __Misc. 2d__, 399 N.Y.S. 2d 391 (1977). Visitation rights of unwed fathers have been treated on a par with married fathers, Pierce v. Yerkovich, 80 Misc. 2d 613, 363 N.Y.S. 2d 463 (1974).

The putative father is also responsible for child support. F.C.A. §545. Where paternity has not been legally established, it will be determined as an incident of a proceeding for custody of visitation.

Functionally, the situation of unwed father Appellant Caban was also substantially similar to that of many married or divorced fathers. He provided a home for his children together with their mother, contributed to their support, spent workday, leisure and holiday times with them, going through the ordinary small routines of everyday family life and child rearing. After the mother of the children left him and took the children with her, he made sure to spend free weekend time with them: Unhappy when his children were taken to Puerto Rico he tried to regain their custody; then when the children were back with their mother he continued to see them every week.

In Quilloin v. Walcott, __U.S.__, 54 2d L. Ed 2d 511 (1978), the Court rejected the claim that the interests of the unwed father in relation to the adoption of his children were indistinguishable from those of a married father who is separated or divorced and no longer living with his child, because the unwed father there had not borne any responsibility for the care or support of the child. Here Appellant Caban, the unwed father had borne such responsibility and demonstrated his commitment to his children.

At the same time there are married or divorced fathers whose committment to their children is minimal. Some may separate from their wives before their child is born; others stay out every night. Where a married mother wants to surrender a child for adoption, the married father has had no opportunity to demonstrate his committment to the child. Yet Domestic Relations Law

§111, grants greater rights to such married fathers than to Appellant Caban. A married father may default in his support obligations as well as an unmarried father. With respect to neither are support obligations self-executing: Where support is not provided legal recourse must be had against both the once married and the unwed father. And even fathers who cannot provide support, provide children with psychological resources and a valuable network of family relationships.*

The discrimination between unwed fathers and unwed mothers pursuant to Domestic Relations Law §111 is equally arbitrary.

Just as "it is no less important for a child to be cared for by its parent when that parent is male rather than female," Weinberger v. Weisenfeld, 420 U.S. 636, 652 (1975), so

*Blaydon & Stack, Income Support Policies and the Family, Deadalus, Spring 1977, p. 147, p. 153-156.

the relationship between father and child, apart from custody, is no less important than the relationship between mother and child.

While some Courts have held that there was no necessary relationship between a parent's gender and suitability for custody of a child, People ex rel Watts v. Watts, __Misc. 2d__, 350 N.Y.S. 2d 285 (1973), the relationship between a parent's gender and the adoption decision is truly remote.

> The Statute here results in denial, without regard to the merits, of the natural right of the father, not because the welfare of the child demands it, nor because there is any question that he is a model father, but simply because he is the male, rather than the female parent." (Dissenting Opinion) Malpica-Orsini, supra, 36 N.Y.S. 2d at 591.

On the principles of Reed v. Reed, 404 U.S. 71 (1971), Frontiero v. Richardson, 411 U.S. 677 (1973), Weinberger v. Weisenfeld, 420 U.S. 636 (1975), Stanton v. Stanton 421 U.S. 7 (1975), Domestic Relations Law §111 should be struck down for impermissible discrimination on the basis of sex as well as marriage status.

CONCLUSION

For all of the foregoing reasons, the judgment of the New York Court of Appeals should be reversed.

Dated: June 27, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6431

ABDIEL CABAN,

Appellant,

—v.—

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

INTEREST OF AMICUS*

Amicus, American Civil Liberties Union is a nationwide, non-partisan organization of 200,000 members. The Juvenile Rights Project is a special project within the ACLU that is dedicated to defending the rights of children and families. Central among those rights is the integrity of the child-parent relationship in a pluralistic society and the protection of that relationship against untoward state intrusion or control. The Juvenile Rights Pro-

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* Letters of consent to the filing of this brief are being lodged with the Clerk of the Court.

ject has participated in numerous cases that seek to insure family liberty and privacy.

STATEMENT OF THE CASE

In 1968 appellee, Maria Mohammed, and appellant, Abdiel Caban, began living together. (R.72,74). She was eighteen years old and he thirty-one. (R.73). Maria adopted Abdiel's surname and became known as Maria Caban. (R. 125-128). They had two children by this relationship and lived together until 1973, when Maria left appellant and took both children with her. (R.179). At the time of the separation the children were 4 and 2 years of age.

Both children's birth certificates list appellant as the father. His paternity of the second child was also acknowledged to the Board of Health. (R.74,78,85-6). Appellant did not, however, seek an order of filiation in the Family Court which would have legitimized his children.*

One month after the mother took the children and left appellant, she married Kazin Mohammed, hereafter referred to as the step-father. (R.90,94). For the first six months following the parents' separation, the children visited their father and slept at his apartment each weekend. (A.28;R.98,345-50).

After six months, the mother sent the children to live with their maternal grandmother in Puerto Rico. This occurred in September, 1974. (R.165,352). There they remained away from their parents for fourteen months. (R.183).

While the children were in Puerto Rico, the paternal grandfather, who also resides in Puerto Rico, visited them often and kept the father informed of their well-being. (R.244, 358). After fourteen months, in November, 1975, the father went to Puerto Rico and, not pleased with their development and life-style, took his children back with him to New York to live in his home with his present wife. (R. 360-367). The children lived with the father in New York for two months. During this time the children were well provided for and appellant contracted to purchase a larger home to accomodate all of them. (R.227-232, 371-374).

In January, 1976, the mother filed a petition for custody in the New York Family Court and obtained a temporary custody order that awarded visitation rights to the father, pending a trial on the merits. (R.270-271, 374-379). Before the custody trial took place, however, both the mother and step-father filed in the New York Surrogate's Court a petition to adopt both children. (A.3-7). The father and his present wife then cross-petitioned for adoption. (A.11-20).

After a hearing, the Surrogate's Court granted the step-father's petition for adoption, and denied the father's petition to adopt. The opinion of the Surrogate's Court is set forth in the Appendix. (A.27-30,31-36). In approving the adoption, the Surrogate's

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* See New York Fam. Ct. Act §517; New York Estates, Powers & Trust Law, §4-1.2.

Court specifically held:

> The prime objective of allowing a putative father to be heard is . . . not to determine the degree of his continued interest in the child but rather to determine the best interests of the child. Any evidence the putative father may offer concerning the solidity of the marriage and the concern and treatment of the child in the new family is particularly relevant. (A.28)

No finding of unfitness or abandonment by the father was made. As a result of the Surrogate's Court's order, all of the father's rights in and to his children, including visitation, were permanently severed.

On appeal the Appellate Division of the New York Supreme Court in a memorandum opinion unanimously affirmed. (A.41-44). An appeal to the New York Court of Appeals was dismissed because the "issues underlying this appeal . . . lack the degree of substantiality necessary to sustain this appeal as of right. . . " (A.45). Probable jurisdiction by this Court was noted on May 15, 1978. (A.51).

INTRODUCTION TO ARGUMENT

This case raises the questions left unresolved by Stanley v. Illinois, 405 U.S. 645 (1972) and Quilloin v. Walcott, __U.S.__, 54 L.Ed.2d 511 (1978): What are the constitutional rights of an unmarried father who has been a member of a de facto family unit with his illegitimate children? After the parents have separated, may a wholly fit and caring unmarried father be deprived of his parental rights altogether?

The resolution of this question is critical to a very large number of children and their fathers. Out-of-wedlock births have increased dramatically in recent years. In 1950, 3.9% of American births were to unmarried women. By 1970 that figure reached 10.7% and in 1975 the figure climbed to 14.2%. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES. 61 (1977). Like the appellant in this case, many of the fathers of these children have taken a deep and abiding interest in their care and custody. Unless the decision of the court below is reversed, however, the father-child relationship may automatically be severed whenever the mother forms a new attachment with a man whom a court believes would be a "better" father than the natural one. Amicus perceives the decision below as a dangerous precedent, insofar as it authorizes the permanent termination of parental rights of a wholly fit parent under the amorphous and ill-defined "best inter-

estsof the child" standard.*

ARGUMENT

POINT I
APPELLANT HAS A SUBSTANTIVE RIGHT TO REMAIN THE PARENT OF HIS CHILDREN.

This Court has long recognized that a compelling state interest is necessary to justify intrusion into a natural family and interference with the parents' right to raise their children.

> A host of cases, tracing their lineage to Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923), and Pierce v. Society of Sisters, 262 U.S. 510, 534-535 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
> Moore v. City of East Cleveland, 431 U.S. 606, (1977).

See, also, Wisconsin v. Yoder, 406 U.S. 205 (1972).*

When parents voluntarily separate, the issue of custody typically arises for the first time. Because parents in this situation generally are no longer capable of cooperation and joint responsibility for their children, one parent necessarily must have custody and primary control over each child. The state must necessarily intrude upon the family for the limited purpose of determining which parent should have custody. As between the natural father and the natural mother in this situation, use of a "best interests of the child" test is appropriate. However, no compelling justification exists for then employing the "best interests" test to sever the child's relationship with the non-custodial parent altogether.

Although custody generally is regarded as the central aspect of parenthood, see Quilloin

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* Amicus perceives an alarming trend, despite strong dicta from this Court, towards terminating parental rights of non-neglecting and otherwise fit mothers and fathers because termination is perceived to be in the "best interests of the child." See, e.g., In re J.S.R., 374 A.2d 860 (D.C.App.1977); In re New England Home for Little Wanderers, 328 N.E.2d 854 (Mass. 1975); In re William L., 383 A.2d 1228 (Pa. 1978)(petition for cert. pending, sub. nom., Lehman v. Lycoming County Children's Services, 77-1704).

* Recent lower court opinions have applied this principle to state schemes which seek to terminate parental rights, e.g., Alsager v. District Court, 545 F.2d 1137 (8th Cir. 1976), or to remove children from their parents' custody in abuse or neglect proceedings, e.g., Roe v. Conn, 417 F.Supp. 769 (M.D. Ala. 1976) (3 judge court); Sims v. Texas Department of Public Welfare, 438 F.Supp.1179(E.D.Tex.1977).

v. Walcott, 54 L.Ed.2d at 520, other incidents of parenthood are of comparable constitutional importance. A long line of decisions establishes that it is the "relationship between parent and child" that "is constitutionally protected." 54 L.Ed.2d at 519, citing Wisconsin v. Yoder, supra; Stanley v. Illinois, supra; Meyer v. Nebraska, 262 U.S. 390 (1923). Biological ties and emotional attachments have been identified as important aspects of the constitutionally protected family relationship. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, (1977). History and tradition have established that these ties, once established in a family setting, can and should be maintained after the breakup of the family. Thus, the non-custodial parent's right to remain in contact with his or her child and to regain custody should the custodial parent die, or become incapacitated or unfit, is an "intrinsic human right" which the Constitution safeguards. See Smith v. Organization of Foster Families for Equality and Reform, supra; quoting Moore v. City of East Cleveland, 431 U.S. at .

This Court has only recently reaffirmed that the State may not terminate parental rights "without some showing of unfitness and for the sole reason that to do so was in the children's best interest." Smith v. Organization of Foster Families for Equality and Reform, supra (Stewart, J., concurring); Quilloin v. Walcott, 54 L.Ed.2d at 520. As the Court in Stanley held, interference with parental rights is only justified by "powerful countervailing interests" on the part of the State. Stanley v. Illinois, 405 U.S. at 651.

Such an interest exists when the natural parent has mistreated or neglected his or her child. See 405 U.S. at 649. However, there is no issue in this case of neglect and abuse.

Certainly no powerful countervailing interest is present in this case. The adoption here accomplishes little more than granting the children the name of the stepfather, while cutting off all ties between appellant and his children. In today's society this fiction is unncessary. Many children live with fathers or mothers whose surname differs from their own.

As one New York Court recently observed in denying a stepfather adoption under the "best interests" standard:

> [I]t is hard to see what appreciable benefit would inure to the child should the adoption be approved. It can be presumed that the child is presently aware or will eventually become aware of the fact that he was born out of wedlock. The adoption will not erase that fact from his mind. Nor is an adoption required in order to give a home to a homeless boy . . . an adoption order cannot by itself constitute or add anything to the quality of this child's upbringing.
> In re Gerald G.G., __App. Div. 2d __, 4 FLR 2368 (2d Dept.,

March 20, 1978).

Moreover, there is no reasonable assurance that the mother's current marriage will create a permanent and stable environment for the children. In fact, as of 1975, one in three first marriages in the United States end in divorce. UNITED STATES BUREAU OF THE CENSUS, Number, Timing, and Duration of Marriages and Divorces in the U.S.; 4,6, June, 1975, Series P-20, No. 297. For persons who have been married once before, the projected divorce rate is about 40%. Id. at 6. Accordingly, the state's interest in effecting a permanent family for appellant's children is "de minimus." See Stanley v. Illinois, 405 U.S. at 657.

Amicus does not urge that all unmarried fathers have an absolute veto over the adoption of their children by the mother's spouse. Thus, unmarried fathers who have had no substantial contact or interest in their children may be viewed in a different light than appellant. Indeed this is the combined lesson of Stanley and Quilloin. Quilloin was "not a case in which the unwed father at any time had, or sought actual or legal custody of his child." In Stanley, by contrast, this Court held that the state could not deprive an illegitimate father of custody of his children upon the death of their mother without a showing of unfitness.

The critical distinction between Stanley and Quilloin is that in Stanley the father had had custody of the children for a number of years and thus the Court recognized his "cognizable and substantial interest" in their

"companionship, care, custody and management." 405 U.S. at 652, 651. Where such a cognizable interest has been established, parental rights cannot be denied merely upon application of the nebulous "best interests of the child standard. It is submitted by Amicus that this standard -- that the parent's interest in his or her child be "cognizable and substantial" -- should be applied in determining when constitutional protection of parental rights other than custody is triggered. Because appellant has had a "cognizable and substantial" interest in his children and because the states interest in their care and custody is "de minimus," appellant's parental rights should be restored by this Court.

POINT II
NEW YORK'S SCHEME AS APPLIED TO APPELLANT DEPRIVES HIM OF EQUAL PROTECTION OF THE LAW.

Even if New York's interest in promoting adoptions were, arguendo, found strong enough to overcome the natural parent's interest in the parental bond, the State cannot promote on the basis of sensitive classifications which this Court has subjected to heightened constitutional scrutiny. There are three separate classifications at issue in this case: unmarried fathers and unmarried mothers; married fathers and unmarried fathers; and legitimacy and illegitimacy.

A. Unmarried fathers and unmarried mothers.

The record shows that both the father and the mother have a substantial rela-

tionship with their children. Both the mother and father lived with the children for four years. Although the mother had custody of the children for the first seven months after the breakup of the de facto family -- during which time the father exercised weekend visitation -- the mother voluntarily separated from her children for the next fourteen months when she sent them to Puerto Rico. It was the father who brought the children back to New York and who had exclusive custody of them for the two months immediately preceding appellees' petition to adopt. Had the statutory scheme in New York allowed consideration of factors beyond gender, termination of petitioner's parental rights could not have been justified. His concern and responsibility for the welfare of the children have been clearly demonstrated.

Notwithstanding the basic parity between the mother and father in their relationship to their children, under New York law the father, but not the mother, is irrebuttably presumed to have no interest in the care, upbringing and welfare of his children.* This discrimination based solely on presumed gender-based characteristics is wholly in conflict with recent decisions of this Court. "To withstand

* In Quilloin v. Walcott, supra, the Court expressly avoided consideration of the gender-based equal protection claim in that case because it was not presented in appellant's Jurisdictional Statement. 54 L.Ed.2d at 518 n. 13. In this case, gender-based discrimination was raised in appellant's Jurisdictional Statement. J.S. at 6.

constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Neither the lower court in this case nor the New York Court of Appeals in Matter of Malpica-Orsini, 36 N.Y.2d 568 (1975), identified any important governmental objectives that the sex classification of New York Domestic Relations Law §111 was designed to further.

Wholesale discrimination on the basis of gender is not necessary to achieve any of the goals identified by the New York Court of Appeals' authoritative interpretation of the provision. Matter of Malpica-Orsini, supra. The court in Orsini indicated that the legislature may have been concerned about the possibility of extortion and black market adoptions. See 36 N.Y.2d at 573. However, unmarried fathers as well as unmarried mothers may be tempted to "sell" their children on the open market. Requiring the consent of both parents gives the child double protection against this occurrence. Further, the interest of the State in preventing extortion would not be compromised by granting an interested parent the right to prevent adoption of his children. To the extent that New York Domestic Relations Law §111 embodies the assumption that granting such a right to fathers who are willing to take responsibility for their children would cause other fathers of illegitimate children to contest adoptions out of spite or greed, the statute is based on unproven generalizations. Even if it is assumed that a significant percentage of unmarried fathers are

likely to resort to blackmail or extortion, New York's scheme is overbroad. Such an overbroad generalization on the basis of sex has been condemned by this Court. See, e.g., Craig v. Boren, supra (the assumption that males are reckless cannot support sex-based distinctions in the sale of 3.2% beer); Stanley v. Illinois, supra (irrebuttable presumption that unwed fathers are unfit is unconstitutional). Moreover, in order to serve any of these goals, the sex distinction embodies "outdated misconceptions concerning the role of females in the home," or simply serves as "an inaccurate proxy for other more germane bases of classification." See Craig v. Boren, 429 U.S. at 198-99.

Other purposes of §111 were identified as "securing a normal home for children" and not discouraging marriage by making it impossible for stepfathers to adopt their stepchildren. 36 N.Y.2d at 573. Taken together, these two statements imply that the goal of the state is to place children in homes with two parents who are married to each other. If this is indeed the state's purpose, then the statute is still overbroad because, as the facts of this case demonstrate, unmarried fathers may also get married and thus be able to suppy a "normal" home for the children.

Finally, New York's policy of facilitating adoption of unwanted and homeless children, see 36 N.Y.2d at 572, would not be undermined by granting a parent who desires to take care of his children the right to prevent their adoption by a stranger. Delay in the adoption

process due to difficulty in locating the natural father, see 36 N.Y.2d at 572, could be avoided by limiting the veto to those fathers who have maintained contact with their children or who have otherwise asserted parental rights.* While sex is related to delay in the adoption process since the mother's identity can be more readily ascertained and verified than can the father's identity, sex classifications must be narrowly tailored to a permissible objective. See, Califano v. Goldfarb, 430 U.S. 199 (1977). In this case, appellant's identity as father of the children has been easily established and never questioned.

The sex-based generalizations inherent in §111 are also defective because the presumption created against unwed fathers is irrebuttable. Irrebuttable presumptions are viewed with great suspicion when they are coupled with a sensitive classification or a constitutionally protected interest. See Stanley v. Illinois, supra; Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Jimenez v. Weinberger, 417 U.S. 628 (1974). Cf., Weinberger v. Salfi, 422 U.S. 749, 771-72 (1975).

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* As of December, 1975, at least twenty-six states required consent to an adoption from unmarried fathers under certain conditions which appellant would have met in this case. At the same time, twenty-one states, including New York, did not require consent from unmarried fathers. Recent Developments -- Rights of the Unwed Father and Consent to Adoption After In re Malpica-Orsini, 61 CORNELL LAW REV 312, 312-313 (1975).

Since §111 gives fathers such as petitioner no opportunity to demonstrate that they do not fit the legislature's stereotype, it cannot withstand constitutional scrutiny.

B. Legitimacy

Wholesale discrimination between legitimates and illegitimates is likely to be the result of habit and prejudice rather than careful analysis. See, Matthews v. Lucas, 427 U.S. 495, 520 (Stevens, J., dissenting). Thus the Constitution demands that classifications based on illegitimacy be "carefully tuned to alternative considerations." Trimble v. Gordan, 430 U.S. 762, 772 (1977), citing Matthews v. Lucas, supra. In Matthews v. Lucas, supra, this Court upheld the provisions of the Social Security Act which, for purposes of determining eligibility for survivors' benefits, conclusively presumed the dependency of legitimate children, and of certain classes of illegitimate children, while requiring other illegitimate children to establish actual dependency. The Court stated:

> [T]he statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations. The presumption of dependency is withheld only in the absence of any significant indication of the likelihood of actual dependency.
> 427 U.S. at 513.

Where statutory schemes were not so finely tuned, however, as in this case, classifications based on illegitimacy have been held to violate the equal protection rights of de facto families. In Trimble v. Gordan, supra, this Court invalidated an Illinois statute which denied an illegitimate child the right to inherit intestate from her father. Although "the lurking problem with respect to proof of paternity," 430 U.S. 771, quoting Gomez v. Perez, 409 U.S. 535 (1973), might justify some different treatment of illegitimates, total disinheritance of all illegitimate children of intestate fathers was unnecessary.

In fact, this Court has regularly invalidated schemes, as the one in this case, which are based "solely and finally on the basis of illegitimacy, and regardless of any demonstration of dependency or other legitimate factors." Matthews v. Lucas, 427 U.S. at 511; New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Levy v. Louisiana, 319 U.S. 68 (1968). See also, Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968). Even where some attempt at tailoring the illegitimacy classifications is made, it will not withstand attack unless it is carefully enough tuned. The statutory scheme at issue in Jiminez v. Weinberger, 417 U.S. 621 (1974) denied disability benefits to certain illegitimate children born after the onset of their father's disability. The Court invalidated this classification because "the blanket and conclusive exclusion of appellants' subclass of illegitimates" was not reasonably

related to the state's goal of preventing fraudulent claims. 417 U.S. at 636. In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), the exclusion of unacknowledged illegitimate children from equal sharing with other of the insured's children in workmen's compensation benefits was found to deny equal protection to that subclass of illegitimates.

C. Married fathers and unmarried fathers

Glona v. American Guarantee and Liability Insurance Co., supra, establishes that the Constitution forbids irrational discrimination against unwed parents, as well as against their children. Although the situation in Glona differs from the Court's other decisions in that it did not involve punishment of innocent children for the sins of their parents, the Court could find no rational basis for the denial of an action for the wrongful death of her child to an unwed mother and thus held the statute unconstitutional.

In Quilloin the Court considered and rejected the father's argument that he was denied equal protection of the law because he was treated differently than "a married father who is separated or divorced from the mother and is no longer living with his child." 54 L.Ed.2d at 520. The Court had little difficulty recognizing a constitutional distinction between Quilloin and a married father since "a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of his marriage." Id.

Although the Court in Quilloin, considering the validity of a statute similar to §111, held that Georgia could reasonably distinguish between a divorced father and an unmarried father who had never demonstrated any interest in obtaining custody of his children, the holding was limited to sustaining the statute "as applied." Appellant in this case is functionally indistinguishable from a divorced father. There is no more need for a stepfather adoption of appellant's children than for adoption of the children of a non-custodial divorced father. Thus the State's discrimination against a known and concerned non-custodial father who has "shouldered . . . responsibility with respect to the daily supervision, education, protection, or care of the child," Quilloin v. Walcott, 54 L.Ed.2d at 520, simply because he never married the mother is arbitrary and irrational.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed.*

Respectfully submitted,

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June, 1978

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* Amicus wishes to acknowledge the invaluable assistance of Ms. Penda Hair in the preparation of this brief.

IN THE

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS
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BRIEF *AMICUS CURIAE* OF THE NEW YORK STATE ATTORNEY GENERAL IN SUPPORT OF APPELLEES

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Opinions Below

The opinion of the Court of Appeals is reported at 43 N Y 2d 708, 401 N.Y.S. 2d 208, 372 NE2d 42 (1977). The opinion of the Appellate Division of the Supreme Court of the State of New York, Second Department is reported at 56 A D 2d 627, 391 N.Y.S. 2d 846. The opinion of the Surrogate's Court of Kings County is not reported and is set out at page 27 of the Appellant's Appendix.

Jurisdiction

The jurisdiction of this Court to hear this appeal is conferred by Title 28, United States Code, § 1257(2). This Court noted probable jurisdiction and leave to appeal *In Forma Pauperis* on May 15, 1978.

Statutes Involved

Domestic Relations Law § 111 and § 111-a, 14 McKinney's Consolidated Laws of New York, 289-291, Cumulative Annual Pocket Part for use in 1977-1978, 20-21.

§ 111 is reproduced at page 5 of appellant's brief.

§ 111-a. Notice in certain proceedings to fathers of children born out-of-wedlock

1. Notwithstanding any inconsistent provisions of this or any other law, and in addition to the notice requirements of any law pertaining to persons other than those specified in subdivision two of this section, notice as provided herein shall be given to the persons specified in subdivision two of this section of any adoption proceeding initiated pursuant to this article or of any proceeding initiated pursuant to section one hundred fifteen-b relating to the revocation of an adoption consent, when such proceeding involves a child born out-of-wedlock provided, however, that such notice shall not be required to be given to any person who previously has been given notice of any proceeding involving the child, pursuant to section three hundred eighty-four-c of the social services law, and provided further that notice in an adoption proceeding, pursuant to this section shall not be required to be given to any person who has previously received notice of any proceeding pursuant to section one hundred fifteen-b. In addition to such other requirements as may be applicable to the petition in any proceeding in which notice must be given pursuant to this section, the petition shall set forth the names and last known addresses of all persons required to be given notice of the proceeding, pursuant to this section, and there shall be shown by the petition or by affidavit or other proof satisfactory to the court that there are no persons other than those set forth in the petition who are entitled to notice.

2. Persons entitled to notice, pursuant to subdivision one of this section, shall include:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, pursuant to section three hundred seventy-two-c of the social services law;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, pursuant to section three hundred seventy-two-c of the social services law;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in written, sworn statement; and

(g) any person who was married to the child's mother within six months subsequent to the birth of the child

and prior to the execution of a surrender instrument or the initiation of a proceeding pursuant to section three hundred eighty-four-b of the social services law.

3. The sole purpose of notice under this section shall be to enable the person served pursuant to subdivision two to present evidence to the court relevant to the best interests of the child.

4. Notice under this section shall be given at least twenty days prior to the proceeding by delivery of a copy of the petition and notice to the person. Upon a showing to the court by affidavit or otherwise, on or before the date of the proceeding or within such further time as the court may allow, that personal service cannot be effected at the person's last known address with reasonable effort, notice may be given, without prior court order therefor, at least twenty days prior to the proceeding by registered or certified mail directed to the person's last known address or, where the person has filed a notice of intent to claim paternity, pursuant to section three hundred seventy-two-c of the social services law, to the address last entered therein. Notice by publication shall not be required to be given to a person entitled to notice pursuant to the provisions of this section.

5. A person may waive his right to notice under this section by written instrument subscribed by him and acknowledged or proved in the manner required for the execution of a surrender instrument pursuant to section three hundred eighty-four of the social services law.

6. The notice given to persons pursuant to this section shall inform them of the time, date, place and purpose of the proceeding and shall also apprise such persons that their failure to appear shall constitute a denial of their interest in the child which denial may

result, without further notice in the adoption or other disposition of the custody of the child.

7. No order of adoption and no order of the court pursuant to section one hundred fifteen-b shall be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section but failed to appear, or who waived notice pursuant to subdivision five. Nor shall any order of adoption be vacated, annulled or reversed upon the application of any person who was properly served with notice in accordance with this section in any previous proceeding pursuant to section one hundred fifteen-b in which the court determined that the best interests of the child would be served by adoption of the child by the adoptive parents.

Question Presented

Does DRL §§ 111-111-a meet the Constitutional requirements of due process and equal protection as defined by this Court?

The Attorney General of the State of New York submits that the statute is constitutional as found by the New York Court of Appeals and further that the statute, as amended after the initiation of the instant proceeding, bears more than a rational relation to the constitutionally permissible objective of protecting the interests of all citizens of New York with regard to consent for the adoption of minors born out of wedlock.

Statement of the Case

The appellant seeks to declare unconstitutional section 111 of the Domestic Relations Law of the State of New York.

Appellant was cited and interposed objections to the petition for adoption of David Andrew C. and Denise C. by Kazim and Maria Mohammed, the natural mother of the children and her husband, in Surrogate's Court, Kings County. After a hearing on the petition and objections Surrogate Sobel issued four orders. Two orders dismissed the appellant's objections to the adoption and two orders approved the respective adoptions of David Andrew C. and Denise C.

The Appellate Division, Second Department, of the New York State Supreme Court affirmed the four orders of the Surrogate's Court in a single order.

The New York State Court of Appeals found appellant's constitutional claims lacking substantiality in view of that Court's decision overruling the challenge to the same section 111 of the Domestic Relations Law in *Mater of Malpica-Orsini,* 36 NY2d 568, 370 N.Y.S.2d 511, 331 N.E.2d 486, app. dsmd. *sub nom. Orsini* v. *Blasi,* 423 U.S. 1042 (1976) "for want of a substantial federal question." Two motions for reargument and rehearing were denied by orders of the New York Court of Appeals filed January 10, 1978 and February 14, 1978.

The Attorney General of the State of New York was not a party to the original determination in the Surrogate's Court, the Appellate Division or the Court of Appeals. The Attorney General of the State of New York is permitted to intervene as *amicus curiae* pursuant to Rule 42 of this Court and does so in support of the constitutionality of the statutes in question.

For the purpose of this appeal the Attorney General submits the following statement of facts. (Numbers in parentheses refer to transcript of proceedings in Record on Appeal; Court of Appeals.)

In 1968 Maria Mohammed entered into an out-of-wedlock relationship with appellant. Appellant was married at that

time but informally separated from his wife and two children for more than eight years (353).

In 1969 and 1971 Maria Mohammed gave birth to David Andrew and Denise respectively. Appellant did not pay the hospital bills for the delivery of either child. Appellant's name appears on the birth certificates of the children due to demands made upon him by Maria (85-86).

At no time did appellant formally acknowledge that he was the father of the children (74-75).

Appellant remained married to his lawful wife, Gloria Caban, however he had no arrangement as to his support of her or their two children by that marriage. At the hearing in Surogate's Court appellant testified that he did not know whether his wife Gloria was employed nor did he care (388-393).

Appelant did not attempt to divorce his wife Gloria while he was living with Maria nor did he ask or offer to marry Maria (89-90).

Maria Mohammed was fully employed during her relationship with appellant except for three months following the birth of Denise. Maria paid all household expenses including the purchase of clothing, etc., for the children (75) (76-77) (85-86).

Appellant's contribution to Maria and the two children was $30.00 a week for food. This $30.00 was contributed by appellant for all four persons and Maria prepared all meals (76-77). After six months of no monetary contributions at all, physical and verbal abuse and lack of familial respect Maria left appellant taking her children with her (120).

Maria terminated her relations with appellant in December, 1973. She married Kazim Mohammed in January, 1974 (93-95).

In September, 1974 Maria's mother took the children to Puerto Rico to temporarily reside with her while Maria and her husband made plans to permanently resettle there (205-207). While the children were with their maternal grandmother Maria and her husband sent money on a bi-weekly basis to contribute to their support. On one occasion they personally visited with the children in Puerto Rico (208-210). Appellant was aware of the children being removed to Puerto Rico (352, 357) and neither protested nor sent money to assist in their support (106) (414-415). Appellant did not demand their return at any time. Appellant never sought to communicate with the maternal grandmother or the children while they were in Puerto Rico (413-416).

By September or October, 1975 appellant was divorced from his first wife Gloria and living with another woman and her children (402, 403, 435). Appellant consulted counsel in New York and then journeyed to Puerto Rico (416, 420). Appellant then saw the two children for the first time since July 8, 1974 (418) and decided they did not look as well as they should have (364) and without consulting local counsel (422) or the police and family court in Puerto Rico (421) he took the children and returned to New York with them where he secreted them from Maria (420). It should be noted that the trial court could not find even a scintilla of evidence supporting appellant's contention that Maria had abandoned the children (Appendix p. 30).

The Family Court returned custody of the children to Maria on November 25, 1975 (378).

Appellant married the woman he had been living with in December, 1975 (426).

The petition for adoption of the two children was filed by Maria and Kazim Mohammed in Surrogate's Court, Kings County on January 15, 1976 (Appendix p. 5).

The Attorney General of the State of New York respectfully submits that this Court, in the best interests of the

children presently before this Court, take note of appellant's affidavits in support of his motions to proceed *In Forma Pauperis* in the New York State Court of Appeals and in this Court.

Furthermore, appellant and supporters of his cause failed to apprise this Court that the house he purchased for the children was surrendered for a failure to meet financial responsibilities.

The Attorney General further submits that appellees, Maria and Kazim Mohammed, have borne the expenses of this litigation by themselves.

POINT I

New York State Domestic Relations Law §§ 111 and 111-a, as a matter of constitutional due process, afford appellant the fairest of statutory means to participate in adoption proceedings under this Court's mandates of *Stanley* v. *Illinois* and *Quilloin* v. *Walcott*.

The threshold question on this appeal is whether appellant, as a matter of constitutional due process and equal protection, is entitled to an absolute veto over the adoption of his alleged children absent a finding of his unfitness as a parent.

The case at bar involves the same constitutional claims which this Court found inadequate in *Quilloin* v. *Walcott*, —— U.S. ——, 54 L Ed 2d 511, 98 S. Ct. 549 (1978).

The statute construed by this Court in *Quilloin, supra*, i.e., Georgia Code Annotated § 74-403(3), provided that the consent of the natural mother alone suffices for purposes of adoption of her illegitimate children.

DRL § 111(3) provides that only the consent of the mother, whether adult or infant, of a child born out of

wedlock need be obtained in an adoption proceeding. DRL § 111-a, effective January 1, 1977, directs notice of an adoption proceeding to the putative father under certain circumstances, allowing the putative father an opportunity to be heard. Family Court Act §§ 517 and 522 permits a putative father to petition the courts of New York State to legitimate his child at any time during the lifetime of the putative father.

FCA § 522 and DRL § 111-a were made effective after the initiation of the instant proceeding, however, as this Court noted in *Quilloin, supra,* 54 L Ed 2d 518 fn. 12: ". . . appellant would not have received any greater protection under the new law than he was actully afforded by the trial court."

Surrogate Sobel reached his decision in the case at bar after active participation of all parties including appellant, by applying the "best interests of the child" standard. The Surrogate was aware of all competing interests as evidenced by his thorough decision.

> "*The prime objective* of allowing a putative father to be heard is therefore not to determine the degree of his continued interest in the child but rather to determine the best interests of the child." Appendix p. 28 Decision of Surrogate Sobel. (emphasis added)

The Surrogate, confronted with serious controverted questions of fact, found that the adoption would keep the children in a family unit already in existence consisting of the natural mother and her husband. This result was desired by all except the appellant. The Surrogate's decision is a careful analysis of all pertinent facts in this matter. As a trier-of-fact he found that there was ". . . *absolutely no evidence, credible or otherwise,* that the new marriage of the natural mother is other than solid or permanent; *and no evidence whatsoever that the children are not well cared for and healthy.* Nothing therefore justifies a denial

of the petition other than that the putative father professes that he loves the children and fervently desires that they continue to bear his name. This is not enough however sincerely motivated." Appendix, p. 30 (emphasis added).

The Court of Appeals found appellant's constitutional claims lacking substantiality in view of that Court's decision in *Matter of Malpica-Orsini, supra,* 36 N Y 2d 568, app. dsmd. *sub nom. Orsini* v. *Blasi,* 423 U.S. 1042.

In *Malpica-Orsini* the New York State Court of Appeals was confronted with a similar constitutional challenge to DRL § 111. That Court held that the father of an illegitimate child is not denied due process in proceedings for a child's adoption where, although the consent of the father is [was] made unnecessary by DRL § 111, the father was given notice of the petition for adoption and appeared by counsel and objected. The court held a hearing on the petition and determined that the proposed adoption by the man whom the natural mother had married was in the best interests of the child.

The decision is a broad analysis of the underlying and conflicting interests of parties to the adoption of out-of-wedlock children, see discussion, Point II, *infra.* As noted, this Court dismissed the appeal, in which the Attorney General of New York State, appeared in defense of the statute, "for want of a substantial federal question."

Here, the attempt to create a due process challenge is singularly without merit. Appellant's notification, opportunity to make his case and the finding of the Surrogate in the "best interests of the child" more than adequately protected appellant's right and the rights of others to constitutional due process of law.

DRL §§ 111 and 111-a bear a rational relation to the constitutionally permissible objective of protecting the interests of all citizens of the State of New York with regard to consent for adoption of minors born out-of-wedlock.

Quilloin v. *Walcott, supra; Zablocki* v. *Redhail,* —— U.S. —— 54 L Ed 2d 619, 97 S. Ct. 673 (1978); *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

This Court stated in *Quilloin,* 54 L Ed 2d 520:

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith* v. *Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 53 L.Ed. 2d 14, 97 S. Ct. 2094 (1977) (Stewart, J. concurring). But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except appellant. Whatever might be required in other situations, we cannot say that the State was required in this situation to find anything more than that the adoption, and denial of legitimation, was in the best interests of the child."

As previously stated Surrogate Sobel adjudicated the rights of parties to this proceeding under the "best interests of the child" standard. However this appeal diverges from the *Quilloin* case on only one issue of fact; the *alleged* participation of the appellant in the children's welfare.

Appellant contends that *Stanley* and *Quilloin* make the particularized finding that the father was an unfit parent. This, appellant advances, is a constitutional predicate for taking his children away.

In the instant case, appellant never obtained nor attempted to obtain legal custody of the children. Although he did have actual custody for various periods of time, this question of fact, was weighed as insufficient under the "best interests of the child" test by two New York State fact finding tribunals, in this complex, emotional custody proceeding. The court did not attempt to break up an existing family unit. The court placed the children in a home that they were already living in. That home consisted of the natural mother and furthermore the tribunals could find no credible evidence that the children were anything but healthy and happy in the existing family unit.

The Surrogate, as evidenced by his decision, also based much of his decision on the credibility of appellant's witnesses. These witnesses were personally before the Surrogate and their credibility was judged by one of New York's most experienced trial jurists.

The statute at bar permits active participation by all parties. The statute disallows absolute veto power by the putative father to enable the trial judge to discern the child's best interest only after all parties have advanced their cause. The trial judge must endeavor to place the child in a setting most conducive to acclimatising these young people to a complex social environment. To allow the putative father absolute veto power over the adoption, or, in the alternative to set a mandate of parental unfitness as the sole guideline of custody is to place the rights of the putative father above the rights of the child. This result would undermine the sole purpose of the adoption process—the welfare of the child.

POINT II

New York State Domestic Relations Law §§ 111 and 111-a, as a matter of constitutional equal protection, afford appellant the fairest of statutory means to participate in adoption proceedings under this Court's mandates of *Stanley* v. *Illinois* and *Quilloin* v. *Walcott*.

As the New York State Court of Appeals stated in *Matter of Malpica-Orsini, supra,* 36 N Y 2d at 571, 370 N.Y.S. 2d at 517:

> "In measuring appellant's claim of a denial of equal protection, it is necessary to consider various standards of review. It has been observed that there is hardly a law on the books that does not affect some people differently from others (see *San Antonio School Dist.* v. *Rodriguez,* 411 U.S. 1, 60, 93 S.Ct. 1278, 36 L.Ed.2d 16 [concurring opn.]). Under traditional analysis, the equal protection clause does not deny to states the power to treat different classes of persons in different ways, but a classification must be reasonable, not arbitrary, and have a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike (*Reed* v. *Reed,* 404 U.S. 71, 75-76, 92 S.Ct. 251, 30 L.Ed. 2d 225; *Neale* v. *Hayduk,* 35 N Y 2d 182, 186, 359 N.Y.S. 2d 542, 544, 316 N.E.2d 861, 862). A State does not violate the guarantee merely because the classifications made by its laws are imperfect. (*Dandridge* v. *Williams,* 397 U.S. 471, 485, 90 S.Ct. 1153, 25 L.Ed.2d 491), and a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (*McGowan* v. *Maryland,* 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393; *Matter of Dora 'HH'* v. *Lawrence, 'II',* 31 N Y 2d 154, 158, 335 N.Y.S. 2d 274, 276, 286 N.E.2d 717, 719)."

Quilloin, as a definitive interpretation of *Stanley,* establishes this Court's directive that a factual inquiry will be made into the relationship. According to *Quilloin* the father will only be given rights accruing to other parties if he can prove a substantial relationship *and* that continuing that relationship will be in the best interests of the children.

The record on this appeal is clear that appellant, although he did have a relationship with the children, did not have a relationship that in any way can be categorized as substantial. See Statement of the Case, *supra.* In fact, appellant's contributions to the relationship were not much more than Mr. Quilloin's. Appellant's brief makes continual reference to his devotion. *Amicus* respectfully submits that incessant repetition will not overcome a record that is almost devoid of meaningful support and contributions to a healthy environment for the children. See Statement of the Case, *supra.*

In *Quilloin, supra,* this Court dismissed appellant's claim of analogous standing with a divorced husband as insufficient, 54 L Ed 2d 520. In the case at bar we are not confronted with an irrebuttable presumption as in *Stanley.* We are confronted with a fact situation as devoid of paternal interest and care as in *Quilloin.*

This Court has recently tended to view illegitimates as a suspect classification. See: *Trimble* v. *Gordon,* 430 U.S. 762 (1977). The degree of scrutiny utilized by this Court in the aforementioned case, however, is inapplicable to the instant case. This Court has never viewed putative fathers as a discreet and insular minority invidiously discriminated against. *Cf. Reed* v. *Reed,* 404 US 71 (1971). The classification here is not gender based but rather an allocation of rights amongst participants of the relationship. As the record shows, the statute was applied for the protection of the illegitimate consequently the equal protection test here must be reviewed from the standpoint of the rational basis

test. Or, as previously quoted from the Court of Appeals decision in *Malpica-Orsini, supra,* is DRL §§ 111-111-a a reasonable classification, not arbitrary, having a fair and substantial relation to the object of the legislation. This Court in dismissing that appeal must be presumed to have approved the view of the Court of Appeals.

The following is excerpted from the Court of Appeals decision in that case (36 N Y 2d at 571-575):

> "Adoption laws in the United States are founded upon broad humanitarian principles and the public policy involved in the statutes is one of beneficence (2 Am.Jur. 2d, Adoption, § 3). Embodied in our adoption statute is the fundamental social concept that the relationship of parent and child, with all the personal and property rights incident to it, may be established independently of blood ties, by operation of law, and that has been part of the public policy of this State since 1887 . . . In harmony with the legislative policy thus expressed, the adoption statute has been most liberally and beneficently applied.
>
> Adoption is a means of establishing a real home for a child . . . 'Adoption has always had the dual function of giving children homes and homes children . . .
>
> The emphasis is now on promoting the welfare of an otherwise homeless child. This change is partly the result of the increasing importance of psychiatry and psychology, which have revealed the role of a happy family life in producing well-adjusted citizens, and partly the inevitable response to a totally changed situation. Illegitimacy and family breakdown have become problems on an unprecedented scale in modern industrial societies. Never before have there been so many thousands of children for whom society finds each year that it must make some provisions . . . *the purpose of adoption is almost uniformly seen as promoting the welfare of children.*'

> To require the consent of fathers of children born out of wedlock . . ., or even some of them, would have the overall effect of denying homes to the homeless and of depriving innocent children of the other blessings of adoption. The cruel and undeserved out-of-wedlock stigma would continue its visitations. At the very least, the worthy process of adoption would be severely impeded."

The Court of Appeals then considered serious procedural problems relevant to the case at bar:

> "Great difficulty and expense would be encountered, in many instances, in locating the putative father to ascertain his willingness to comment. Frequently, he is unlocatable or even unknown. Paternity is denied more often than admitted. Some birth certificates set forth the names of the reputed fathers, others do not.
>
> Couples considering adoptions will be dissuaded out of fear of subsequent annoyance and entanglements. A 1961 study in Florida of 500 independent adoptions showed that 16% of the couples who had direct contact with the natural parents reported subsequent harassment, compared with only 2% who had no contact. . . . The burden on charitable agencies will be oppressive. In independent placements, the baby is usually placed in his adoptive homes at four or five days of age, while the majority of agencies do not place children for several months after birth. . . . Early private placements are made for a variety of reasons, such as a desire to decrease the trauma of separation and an attempt to conceal the out-of-wedlock birth. It is unlikely that the consent of the natural father could be obtained at such an early time after birth, and married couples, if well advised, would not accept the child, if the father's consent was a legal requisite and not then available. Institutions such as

foundling homes which nurture the children for months could not afford to continue their maintenance, in itself not the most desirable, if fathers' consents are unobtainable and the wards therefore unplaceable. These philanthropic agencies would be reluctant to take infants for no one wants to bargain for trouble in an already tense situation. The drain on the public treasury would also be immeasurably greater in regard to infants placed in foster homes and institutions by public agencies.

Some of the ugliest disclosures of our time involve black marketing of children for adoption. One need not be a clairvoyant to predict that the grant to unwed fathers of the right to veto adoptions will provide a very fertile field for extortion. The vast majority of instances where paternity has been established arise out of filiation proceedings, compulsory in nature, and persons experienced in the field indicate that these legal steps are instigated for the most part by public authorities, anxious to protect the public purse. . . .

While it may appear, at first blush, that a father might wish to free himself of the burden of support, there will be many who will interpret it as a chance for revenge or an opportunity to recoup their 'losses'.

Marriages would be discouraged because of the reluctance of prospective husbands to involve themselves in a family situation where they might only be a foster parent and could not adopt the mother's offspring.

We should be mindful of the jeopardy to which existing adoptions would be subjected and the resulting chaos by an unadulterated declaration of unconstitutionality. Even if there be a holding of nonretroactivity, the welfare of children, placed in homes months ago, or longer, and awaiting the institution or completion of legal proceedings, would be seriously affected. The attendant trauma is unpleasant to envision.

> Certainly, these facts demonstrate that the classification is reasonable, not arbitrary, and keeping in mind the paramount consideration of a child's welfare, the legislative action is justified." (citations omitted) (emphasis added)

The welfare of a child is certainly a legitimate state interest. See *Prince* v. *Massachusetts,* 321 U.S. 158 (1944).

The Attorney General of the State of New York respectfully submits that DRL §§ 111-111-a present a statutory framework wrought from careful legislative considerations. As previously discussed, the adoption process places the welfare of the illegitimate child above not only the rights of the putative father, but, even the natural mother.

The classification of the putative father bears a significant relationship to the purpose of the statute. It is the illegitimate child who is the primary beneficiary of the adoption process. The putative father is afforded notice and an opportunity to make his case at a hearing in which the best interests of the child are the guiding standard.

Amicus, Community Action for Legal Services, finds it all too easy to state that the Court of Appeals in *Malpica-Orsini* based its discussion on conjecture. Much to the contrary, Legal Services brief is replete with conjecture, confusing attempts at juxtaposition and a failure to point out that even Judge Jones, dissenting in *Malpica,* 36 NY2d at 585, stated that New York has a "compelling state interest" in the care and well-being of all its children.

Assuming, *arguendo,* this Court were to use the most stringent of judicial scrutiny it is evident that the State's interest is compelling and there is no less burdensome means of accommodating the putative father. Again, the Attorney General stresses the import of this legislation aimed at the welfare of the child not a father who has presently entered his third familial relationship, does not express care about the well-being of the two children of his

first relationship, See Statement of the Case, and contributed a meager $30.00 a week, while he was so disposed of such generosity, to Maria, David, Denise and himself.

As this Court stated in *Smith* v. *O.F.F.E.R.,* 431 U.S. 816, 843 (1977), ". . . biological relationships are not exclusive determination of the existence of a family." The hearing required under DRL §§ 111-111-a is appropriate to the nature of this case. *Smith* v. *O.F.F.E.R., supra,* 431 U.S. 816, 830. Arbitrariness which Amicus contends is present in the judge's mind is an insufficient contention. The very basis of the adoption process emanates from a knowingly assumed contractual relation with the State. It becomes all too easy for a discontented participant to this process to raise such an unfounded argument. Without DRL §§ 111-111-a the child is made a pawn in embittered and sometimes avariciously motivated custody proceedings not to mention the diminished chances of the child finding equal rights in a secure home upon the adoption by the natural mother and her husband. See: *Jiminez* v. *Weinberger,* 417 U.S. 628.

Stanley v. *Illinois* does not indicate any flaw in DRL §§ 111 and 111-a as appellant urges. New York makes no statutory presumption of unfitness of the putative father. The New York statute, as the Georgia statute held constitutional in *Quilloin* v. *Walcott,* affords the putative father due process of law, see Point I, *supra,* and in so doing secures for him equal protection under the laws which he has a right to invoke to protect his interests. It must be reiterated, however, that the putative father's rights in the instant proceeding are not equal to or above the rights of his alleged illegitimate children. The legislature of the State of New York was primarily motivated by concern for the welfare of the child. DRL § 111-a is a rational legislative allocation of rights between the natural mother and the putative father. Certainly DRL §§ 111-111-a are in keeping with this Court's paramount concern for the child's welfare and the legislation is justified under the equal protection clause.

POINT III

Equal protection guarantees do not mandate the natural mother and putative father to be in the same jural relationship to the children.

The classification of the appellant, putative father, is not a semantic distinction. Rather the classification is one undeniably based in sociological and biological reasoning (See discussion *Malpica-Orsini, supra,* Point II) enabling the legislature of the State of New York to enact legislation more in tune with promoting the welfare of the child. No intention or motive can be found, or has been offered by appellant, on the part of the legislature to single out appellant solely on the basis of sex. Any argument advanced by appellant that the classification is invidious is without foundation in practicalities.

Furthermore, this Court has not adopted the principle that sex is a suspect classification. Indeed, this Court's holding in *Reed* v. *Reed,* 404 U.S. 71 (1971) that gender-based distinctions are not inherently suspect, requiring that they merely be tested by the standard of rational relationship, has not been overruled. See, e.g. *Craig* v. *Boren,* 429 U.S. 190 (1976); *Califano* v. *Goldfarb,* 430 U.S. 199 (1977); *Califano* v. *Webster,* 430 U.S. 313 (1977); Cf. *Frontiero* v. *Richardson,* 411 U.S. 677 (1973).

As this Court stated in *Trimble* v. *Gordon,* 430 U.S. 770, there are numerous reasons for setting varying criteria when the rights of the natural mother and the alleged putative father come into conflict.

The adoption process operates as a matter of public policy, independent of blood ties. The statutory framework upon which it rests is founded upon benefiting the children and finding a true home for them.

Family breakdown and illegitimacy are important concerns of the legislature in attempting to promote the welfare of the children. The State of New York has im-

plemented an adoption process which operates smoothly and efficiently and has, as its primary beneficiary, the interests of the children at heart.

To require the consent of putative fathers, or some of them, would have deleterious effects on the very process itself and continue to visit the stigma of illegitimacy on the children.

The legislature took reasoned cognizance of the sociological realities that the children born out of wedlock normally reside with the natural mother after birth. And the legislature can properly accord great weight to the biological fact that in almost all cases the State can ascertain the true identity of the natural mother. This is opposed to the serious problematic practicalities of ascertaining the identity of the putative father.

The legislature realized that paternity suits are more often than not instituted by the natural mother and the legislature went even further to consider the possibilities of blackmail or avariciously motivated litigation by the putative father.

In summary, the Attorney General has found no case in which this Court has held that sex is a suspect classification and therefore must subject the State to a test under which compelling interests are served by the classification.

Rather, the appropriate standard for this Court to consider is whether the classification embodied in DRL §§ 111-111-a bears a rational relationship to the object of the legislation.

The object of the legislation before this Court is the welfare of the children. The classification of the putative father reflects a legislative allocation of rights amongst many parties to the adoption. Certainly, the considerations aforementioned demonstrate that the classification is reasonable, not arbitrary, and in keeping with this Court's paramount concern for the well-being of the children. *Quilloin* v. *Walcott, supra.*

POINT IV

The judgment of the New York State Court of Appeals should be affirmed.

Dated: New York, New York
July 24, 1978

Respectfully submitted,

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